Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM RODEN, as Trustee of Ernest M. Still Trust; RODEN FARMS, a General Partnership; CAL FARM INVEST, INC., a California corporation; GARY HAMILTON, an individual; SUSAN HAMILTON, an individual,
Petitioners,

vs.

BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO. LP, a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE STATE ACTION IMMUNITY DOCTRINE OF ANTITRUST LIABILITY AND ITS CASE PROGENY, *NOERR-PENNINGTON*, APPLIES WHEN THE LEGISLATORS OF A WATER DISTRICT BOARD ARE NOT MERELY SUBJECT TO A PRIVATE PARTY'S LOBBYING EFFORTS, BUT ARE THEMSELVES SUBORDINATE, PAID EMPLOYEES OF THE PRIVATE PARTIES WHO CONSPIRE TO MONOPOLIZE CONTROL OF THE BOARD'S AUTHORITY TO DISTRIBUTE AND SELL SURPLUS WATER FOR THEIR OWN BENEFIT AND TO THE DETRIMENT OF PETITIONERS AND OTHER LANDOWNERS IN THE DISTRICT?

PARTIES TO THE PROCEEDING

Petitioners in this Court are:

William Roden, as Trustee of Ernest M. Still Trust
Roden Farms, a General Partnership
Cal Farm Invest, Inc., a California corporation
Gary Hamilton, an individual
Susan Hamilton, an individual

Respondents in this Court are:

Berrenda Mesa Water District
Blackwell Land Company, Inc. a
Delaware corporation
Paramount Limited Partnership and its member
corporations

The foregoing are not all of the parties in the Courts below. Those parties who appeared in the lower court as Plaintiffs/Appellants and who are not participating in this action are as follows:

David G. Hedgecock, et al.
Santa Fe Energy Resources, Inc., a corporation
Chandler's Palos Verdes Sand and Gravel,
a corporation

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

WILLIAM RODEN, as Trustee of Ernest M. Still Trust;
RODEN FARMS, a General Partnership;
CAL FARM INVEST, INC., a California corporation;
GARY HAMILTON, an individual;
SUSAN HAMILTON, an individual,
Petitioners,

vs.

BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO. LP, a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, William Roden as Trustee of Ernest M. Still Trust; Roden Farms, a general partnership; Cal Farm Invest, Inc., a California corporaton; Gary Hamilton, an individual; and Susan Hamilton, an individual, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of California granting defendant's motion to dismiss is unreported and is reprinted at Appendix A. The decision of the Court of Appeals for the Ninth Circuit affirming the District Court's decision is unreported and is reprinted in Appendix B.

JURISDICTION

The jurisdiction of the United States District Court for the Eastern District of California was based upon 15 U.S.C. §§ 7, 15 and 26 (Sherman Act and Clayton Act). The final judgment of the District Court was entered July 15, 1993. A notice of appeal was filed by Petitioners on August 13, 1993. The Court of Appeals for the Ninth Circuit entered its decision affirming the District Court on April 7, 1995. The instant Petition for Certiorari is timely pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is based upon the final decision of the United States Court of Appeals for the Ninth Circuit and is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 15 United States Code § 1.[1]

> **Trusts, etc., in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or

[1] As amended Nov. 16, 1990, P.L. 101-588, § 4(a), 104 Stat. 2880.

with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Title 15 United States Code § 2.

Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [2]

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[2] As amended Nov. 16, 1990, P.L. 101-588, § 4(b), 104 Stat. 2880.

STATEMENT OF THE CASE

Petitioners William Roden, as Trustee of Ernest M. Still Trust; Roden Farms, a General Partnership; Cal Farm Invest, Inc.; Gary Hamilton, an individual; and Susan Hamilton, an individual, are a trustee, a general partnership, a corporation, and individuals who own or lease land in the Berrenda Mesa Water District (hereinafter "BMWD"). Respondent, BMWD, is a California Water District organized under the California Water Code. Respondent Paramount is a limited partnership, corporations which are general partners in that limited partnership, and a corporation owning land located in the BMWD. Respondent Blackwell Land Company, Inc., (hereinafter "Blackwell") is a Delaware corporation owning land in the BMWD. The BMWD is located in Kern County, California.

The BMWD was created in 1963 under the California Water Code as a member unit of the Kern County Water Agency (KCWA). The KCWA water, which is the only viable source of water for farming within BMWD, is then distributed to landowners by the BMWD. Based on the BMWD's annual supply of water each landowner within the BMWD is allotted 2.82 acre feet of water per acre. Water allocated and credited to the BMWD is based upon the number of acres within the BMWD, whether or not such land is actually farmed. To pay for the allotted water to the BMWD, landowners are assessed standby charges, ad valorem taxes and water tolls. In the event a landowner defaults on standby charges and ad valorem taxes, the BMWD has the authority to foreclose on property owned by the delinquent landowner. Upon foreclosure, the allocation of water attributed to the foreclosed land, remains within and under the control of the BMWD.

The BMWD has a Board of Directors comprised of five members, who are elected only by landowners in the BMWD. The landowners are given one vote for every dollar of assessed value of land owned within the BMWD. California Water Code §§ 34700, 35003.[3] Thus, the largest landowners receive more votes and control. Respondents, Paramount and Blackwell, as the largest landowners, have voted to install a majority, four out of five, representatives, who are paid employees of the Respondents, on the BMWD Board of Directors.

On December 31, 1992 Petitioners filed an action in District Court alleging anticompetitive activities in violation of Sections 1 and 2 of the Sherman Antitrust Act,

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[3] § 34700. Director

Each director shall be a holder of title to land within the district or the legal representative of the holder of title to land. If a corporation holds title to land, the president of the corporation or persons selected by resolution of its board of directors filed with the district may serve as directors.

§ 35003. Voters; Number of votes; Assessment book as evidence of vote entitlement; Exception

Each voter shall have one vote for each dollar's worth of land to which he or she holds title. The last equalized assessment book of the district is conclusive evidence of ownership and of the value of the land so owned except that in the event that an assessment for a district shall not have been made and levied for the year in which the election is held, the last . . . assessment roll of each affected county shall be used in lieu of the assessment book of the district *as evidence of ownership.* However, the board may determine by resolution that the assessment book or . . . assessment roll of each affected county shall be corrected to reflect, in the case of transfers of land, those persons who as of the 45th day prior to the election appear as owners on the records of the county. *If an equalized assessment book of the district does not exist, then each voter shall be entitled to cast one vote for each acre owned by the voter within the district, provided that if the voter owns less than one acre then the voter shall be entitled to one vote and any fraction shall be rounded to the nearest full acre.*

15 U.S.C. §§ 1 and 2, in that Respondents, as private parties and as de facto members of the BMWD and at their direction, are involved in a conspiracy to destroy Petitioners' businesses, to monopolize the market for water deliveries within the BMWD and to destroy competition for water by pursuing the following course of action.

In 1986 the two largest landowners within BMWD were Blackwell and Berrenda Mesa Farming. At that time, the BMWD Board of Directors through hearings, decided and unanimously affirmed that approximately one-third of the BMWD maximum annual entitlement, or 50,000 acre feet, was surplus to its long term needs and that it was in the best interest of the BMWD to sell this acre feet supply.

In early 1988, negotiations for the sale of 50,000 acre feet of annual water entitlement from BMWD to Moulton Niguel Water District began at the direction of the Board of Directors. On July 15, 1988, BMWD published a Notice of Hearing regarding the sale of surplus water for $1000.00 per acre foot, for a total sale price of $50,000,000.00. BMWD took all necessary steps to sell the water to include the filing with the state clearing house and circulation of its "Initial Study and Proposed Negative Declaration" regarding the proposed transfer.

Sometime after July, 1988, Respondent Paramount entered into negotiations with West Hills (a division of Berrenda Mesa Farming) and Respondent Blackwell for the purchase by Paramount of agricultural land in the BMWD. A critical term of these negotiations was that Paramount required assurances from these sellers that no sale of any entitlement water would take place prior to Paramount's purchase. In the course of those negotiations and secret meetings between Paramount and Blackwell, the representatives agreed to obstruct and hinder transfer of water from BMWD despite the fact that the

BMWD Board had already decided it was in the best interest of the BMWD to make that sale. On November 22, 1988, during a closed meeting of the BMWD Board of Directors, controlled by Blackwell and West Hills, they withdrew their support for the water sale. An informal vote was held and the sale of water was terminated by a 4 to 1 vote. Respondents were successful in using the government process to obstruct the sale of surplus water allocated to Petitioner and others in like positions.

In 1989, Paramount, after completing the purchases, became the largest landowner in the BMWD. Paramount then acted to install two of its own representatives on the Board, so that Paramount and Blackwell each had two of its own representatives on the Board of Directors of the BMWD and therefore controlled four of the five votes. Since that time Paramount has consistently and steadfastly acted to oppose and prevent the sale of surplus water.

In the course of this monopoly to use the government process, Respondents appointed a majority of the BMWD who were controlled solely by the anticompetitive interests of Respondents and to the detriment of the interests of the BMWD and the other members of the BMWD.

In September, 1990, the Board approved another sale of 20,000 acre feet of surplus water to Summit Valley Water District for a sale price of $20,000,000.00. The sale was opposed by the Paramount representatives. Paramount then, by using another form of government process, threatened BMWD with litigation over the proposed sale. The pressure resulted in a decision by the Board to cancel the proposed sale.

Respondents were aware that the current high cost of water supply meant that, particularly for row crop farmers, the cost of production was higher than the sales price of the crop. Thus, these farmers, including

Petitioners, could not profitably farm their land nor could they use any water from BMWD. With this knowledge, Respondents caused BMWD to impose very large standby fees, which fees continued to accrue even while the land was not being farmed and no water was being used. The imposition of these fees resulted in Respondents forcing Petitioner and those in a like position, to pay for water that was ultimately used by Respondents.

The imposition of standby fees became a governmental process tool used by Respondents to further achieve the objective of the monopoly and conspiracy to eliminate competition for the proceeds from the sale of BMWD water, and foreclose on the affected landowners, all to the exclusion of the best interest of the BMWD .

BMWD could have; and indeed planned, to sell the surplus water to other districts, thereby alleviating the need to impose any standby fees. Instead, Respondents' actions caused the imposition of fees in amounts which exceeded Petitioner's financial resources resulting in foreclosure, thus acquiring for Respondents, for greatly reduced rates, the water allocations associated with the landholdings of Petitioners.

Due to Respondents not selling excess water, Petitioners have paid hundreds of thousands of dollars in standby fees for which they have received no water, and have lost thousands of acres through foreclosure.

The conspiracy and monopoly is predicated upon Petitioners and other small farmers not being able to pay exorbitant standby charges indefinitely, along with ad valorem taxes and assessments, making foreclosure virtually inevitable, and which could be ameliorated by the sale of surplus water.

The water allocated to the land in Berrenda Mesa has more value than the land. Once competition for water

within the BMWD is eliminated, Respondents will reap massive financial benefit, and thus, should be held liable for antitrust violations as alleged in the complaint brought by the Petitioners.

Based upon State immunity as to BMWD, and upon the *Noerr-Pennington* immunity doctrine as to the private Respondents, the District Court dismissed the action. In the District Court's Memorandum Opinion, (Appendix "A"), it found that the BMWD challenged actions were state authorized and that there is a clear and express state policy to displace competition with regulation and these findings are sufficient to extend state antitrust immunity to the BMWD as a public entity performing local governmental function. As to the private actors, Paramount and Blackwell, the Court found they are not immune under the state action doctrine. However, they are protected from antitrust liability for acts intended to influence the actions of the District Board members under the *Noerr-Pennington* doctrine.

Petitioners appealed from the District Court decision, claiming that the District Court erred in that the scope of the *Noerr-Pennington* doctrine is limited and the Court's ruling is based upon an incorrect factual finding.

On April 7, 1995, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court that Respondents are immune from antitrust liability. The Appeal Court stated in their memorandum that under the California Water Code, BMWD's refusal to sell allegedly excess water, and the concomitant increase in standby charges, is a foreseeable result of the state's delegation of these powers to local water districts. The Court further stated that "Petitioner's allegations do make out a case that the Respondent landowners acted in their own self-interest in bringing about water district decisions favorable to them and detrimental to the Petitioners. However, it is beyond the scope of the

antitrust laws to identify and invalidate lobbying that has produced a selfishly motivated agreement with public officials." The Courts overlooked the fact that these public officials are on the payroll of the conspiratorial corporations and entirely under their control.

The Court of Appeals erred in extending antitrust immunity under this factual situation. This petition should be granted to resolve an important and recurring question of antitrust law.

REASONS FOR GRANTING THE PETITION

The undisputed facts disclose a violation of the Sherman Act. Certiorari should be granted for the following reasons.

This case raises, in part, the question of whether the District Court erred in dismissing Petitioner's causes of action for violation of Section 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2:

The Petition should be granted to decide an antitrust liability question under a factual situation that is without precedent. Whether the State Action Immunity Doctrine of antitrust liability and its case progeny, *Noerr-Pennington*, applies when the legislators of a water district board are not merely subject to a private party's lobbying efforts, but are themselves subordinate paid employees of the private parties who conspire to monopolize control of the board's authority to distribute and sell surplus water.

The Court of Appeals decision to affirm the District Court dismissal is in error in both of the above respects, under prevailing case law and under facts not considered in prior Supreme Court opinions.

I.

THE COURT OF APPEALS ERRED IN FINDING THAT THE STATE ACTION IMMUNITY DOCTRINE AND ITS CASE PROGENY, *NOERR-PENNINGTON* INSULATES PRIVATE DEFENDANTS WHO CONTROL THE DISTRICT'S BOARD THROUGH BOARD MEMBERS EMPLOYED BY THE PRIVATE PARTIES, FROM ANTITRUST LIABILITY FOR PREDATORY ANTICOMPETITIVE BEHAVIOR AND USING THE GOVERNMENTAL PROCESS FOR THAT MEANS.

The Court of Appeals found that Respondents, Blackwell and Paramount, as private actors, were immune under the *Noerr-Pennington* doctrine exception from federal antitrust laws. The court further found that Petitioner's allegations do make out a case that the private Respondent landowners acted in their own self-interest in bringing about water district decisions favorable to them and detrimental to the Petitioners. However, the court said it is beyond the scope of the antitrust laws "to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383, 111 S.Ct. 1344 (1991). Appendix "B".

The Court erred in its statement of the law and in its application of law to fact. Lobbying is not at issue here, rather the issue is the Respondents' patent, blatant control of a governmental agency by electing as the BMWD's board of directors their own employees and in using the governmental process for their own anticom-

petitive purposes and whether these actions fall within one of the recognized exceptions to antitrust liability.

A. *Noerr-Pennington* Exception to Antitrust Liability

The Court of Appeal erred in applying the *Noerr-Pennington* doctrine of immunity to the private party Respondents. The Court's decision herein presents a direct conflict to the legal issues raised.

This Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965) formulated the doctrine which exempts from federal antitrust laws "conduct of private individuals in seeking anticompetitive action from government." This doctrine rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not appropriate for application in the political arena." *Noerr.* The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government which are protected by the First Amendment right to petition for redress of grievances, even if the motive behind the efforts is anticompetitive. However, under the factual situation of this case, Respondents are not attempting to influence government, they are the government.

Noerr recognized, however, what has come to be known as the "sham" exception to its rule. "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144, 81

S.Ct. at 533. The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process as opposed to the outcome of that process as an anticompetitive weapon. *City of Columbia citing, California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972).

The BMWD, controlled by the Respondents who can vote in its Board of Directors, is a far cry from the political independent decision maker which one would have a First Amendment right to lobby without fear of antitrust liability. *California Motor*, like the instant case, is different from *Noerr*, in that, the allegations are not that the Respondents sought to influence public officials, but that the Respondents sought to bar their competitors from meaningful access to District decisions regarding their use and sale of their surplus water and to usurp and use the government process of decision making. They did this by having their paid representatives, as Board members, delay and veto the sale of surplus water, and instituting unnecessary and exorbitant fees regardless of the merits of their actions in order to prevent Petitioners and like landowners from being able to financially afford to keep their businesses and land.

The Court of Appeals erred in finding the BMWD's actions were genuinely an attempt to influence governmental action. The undisputed facts show that Respondents made agreements to veto any sale of surplus water based upon their own plans to cause detriment and land loss to Petitioners and others. There was no benefit to the district and the alleged threat to future water supply is groundless. They instituted a baseless action to forestall the sale of surplus water without regard to the merits of future need for water. Respondents undertook these actions for their own benefit, and their actions were designed to delay Petitioners' ability to sell their (not Respondents') surplus water and disrupt Petitioners'

farming businesses by saddling them with onerous regulatory fees, costs and burdens.

The foregoing allegations and undisputed facts show Respondents undertook activity solely to delay or prevent Petitioners' ability to market their surplus water through the use of "the governmental process," as opposed to the outcome of that process, as an anticompetitive weapon. Respondents were not concerned with stopping Petitioners' warranted sale of their surplus water through government action but through the imposition of costs and burdens associated with the government process. Thus, Petitioners have stated a cause of action under the sham exception and the District Court and the Ninth Circuit erred in granting Respondent's dismissal.

B. *Midcal* Exception To Antitrust Liability

Although this court stated a state action exemption in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943), it did not involve private conduct, subsequent case law has made it clear that private entities may claim state action immunity if their challenged activity was direct *and* supervised by the state. *Federal Trade Commission v. Ticor Title Insurance Co.*, 922 F.2d 1122, 112 S.Ct. 2169 (1992). "Private party conduct is immune from anti-trust liability under the State Action Doctrine only if the party claiming immunity shows that its conduct satisfies two requirements." *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980). "A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the state has articulated a clear and affirmative policy to allow the anti-competitive conduct, *and* second, the State provides active supervision of anti-competitive conduct undertaken by private actors." (*See Ticor.*) There is a

close relationship between the two requirements: "Both are directed at ensuring that particular anti-competitive mechanisms operate because of a deliberate and intended state policy." *Id.*

The Court of Appeals in affirming the District Court erred in not addressing the second prong of private actor's immunity under the *Midcal* test. This Court held that the active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests, and no protection against the type of conduct complained of herein.

The purpose of the active supervision inquiry is not to determine whether the State of California has met some normative standard in its water code regulatory practices (*see Ticor*). Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the sale of surplus water have been established as a product of deliberate state intervention, not simply by agreement among private parties. It is clear from the facts alleged in the complaint and subsequent documents submitted that the California Water Code does not provide that the State review or achieve a level of supervision in the process of when or if there be a sale of surplus water. There is not even the mere potential for state supervision. In the absence of active supervision in fact, there can be no state action immunity for what were otherwise private arrangements not to sell surplus water, to the detriment of Petitioners.

This court, in *Ticor*, held that "Actual state involvement, not deference to private anti-competitive activity

under the general auspices of state law, is the precondition for immunity from federal law."

Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of the challenged activity. It is this "active supervision" prong of the state action immunity test which "prevents States from casting . . . a gauzy cloak of state involvement over what is essentially private anticompetitive activity." *Southern Motors Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 at 61 n. 23, 105 S.Ct. 1721 at 1729 n. 23 (1985), *quoting Midcal* 445 U.S. at 106, 100 S.Ct. at 943-44.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN FINDING THE BMWD'S CONDUCT IS NOT IN VIOLATION OF THE SHERMAN ANTITRUST ACT. THE COURT'S DECISION, AS APPLIED, IS TOO AMBIGUOUSLY SWEEPING WHEN APPLIED TO THE PROBLEM OF THIS CASE, WHICH IS WHETHER THE BERRENDA MESA WATER DISTRICT'S CONDUCT VIOLATES THE SHERMAN ANTITRUST ACT, 15 U.S.C. §§ 1 AND 2; AND IF SO, WHETHER ONE OF THE NARROW EXCEPTIONS TO THE ACT APPLIES.

A violation of the Sherman Act is established upon a showing of monopoly power in a relevant market, and that the party possessing the monopoly power has or intends to use such power to unreasonably restrict or eliminate competition in the market. *U.S. v. E.I. du Pont*

de Nemours & Co., 351 U.S. 377, 389-91, 76 S.Ct. 994, 1003-05 (1956); *Dimmitt Agri Industries, Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 525 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1770 (1983).

The relevant market at issue in this case is the market of surplus water within the Berrenda Mesa Water District. BMWD's ability to sell surplus water within the District on the market is quite clear, and BMWD intended to exercise this power to eliminate competition for water from Petitioners and individual landowners by not selling the surplus water and charging unnecessary exorbitant fees, thus excluding those landowners. The BMWD attempts to justify its actions by stating that it does not exclude Petitioners and other smaller landowners, but rather only limits the sale of surplus water pursuant to the BMWD's independent analysis and decision. However, the evidence surrounding the Board's decision to limit and or not to sell surplus water is fatal to the Petitioners' and other individual district members' agricultural industry and landownership, and amounts to a de facto prohibition on the sale of surplus water. Both the intent and the effect of the Board's resolution, not to sell the surplus water was to put the smaller landowners out of business and to acquire ownership of their lands. These actions by the BMWD Board violate section 2 of the Sherman Act.

A. State Action Exemption

The District Court determined and the Court of Appeals agreed, *however*, that BMWD is exempt from enforcement of the Sherman Act, even if a violation exists. A "state action exemption," as pronounced in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943), may apply to a municipality when: (1) the state legislature has "clearly articulated and affirmatively expressed"

a state policy granting the municipality the power to legislatively displace competition within a particular regulated area; *and* (2) the municipality has not unreasonably exercised such authority. *Community Communication Co. v. City of Boulder*, 455 U.S. 40, 51-53, 102 S.Ct. 835, 841, (1982); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 409, 98 S.Ct. 1123 (1977).

1. Statutory Authority

In this case, the District relies on statutory authorization by the State of California to regulate and control the sale of surplus water within the Berrenda Mesa Water District. California Water Code § 35423.[4]

The statutory authority relied upon by the District Court and the Court of Appeals herein also reflects the State's desire to give exclusive regulatory power over the sale of surplus water. Although the statutes are not specific as to when a threshold of surplus water can be sold or the manner of regulation, such specificity is not required. Nor does the California Water Code contain a mandate to displace competition in the sale of water, but a mandate is not needed.

The State has clearly authorized the BMWD to regulate the sale of surplus water in its district, and the Court of Appeals correctly found that such authorization is

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[4] § 35423 Rules and regulations

A district may establish, print, and distribute equitable rules and regulations for the sale and distribution of water. A district may provide therein that water shall not be furnished to (1) persons who violate the rules and regulations or against whom there are delinquent water, standby, facility, or other charges, or penalties or interest on any such charges, or (2) land against which there is a delinquent assessment.

sufficient to satisfy the *Parker* requirement of "clearly articulated and affirmatively expressed" state policy. Additionally, the Court of Appeal correctly found that active state supervision is not required as to the District under *Town of Hallie v. City of Eau Claire*, 471 U.S. 4, 105 S.Ct. 1713 (1985).

The determination of the availability of *Parker* immunity therefore turns on whether the District has exercised such authority in a reasonable manner.

2. Unreasonable Exercise of Authority

This Court, in *Indep. Taxi v. Greater Houston*, 474 U.S. 903, 106 S.Ct. 231 (1985), addressed the issue of reasonableness in exercise of authority. The City of Houston was found immune from federal antitrust liability for unequal treatment of taxicabs at Intercontinental Airport. In that case, the City used its authority to entirely, rather than selectively, displace competition in the airport taxi business. *Santos v. City of Houston, Texas*, 852 F.Supp. 601, S.D. Tex. (1994). Its decision to enter into an exclusive contract arose as a result of an influx of taxicab service at the airport when it opened. *Id.* The City's actions were decisive, a legitimate goal was achieved, and the City's action in excluding other taxicab services was consistent and not arbitrary, *id.* (distinguishing *Indep. Taxi*).

Analogous to the instant case, the court in *Santos* found the City was in violation of antitrust laws in that an ordinance was not effectively achieving the City's alleged current objective, which is traffic safety, and was an unreasonable exercise of authority. The BMWD action in arbitrarily not selling surplus water is not achieving the current objective which is to act in the best

interest of the district and its members. California Water Code § 35425.[5]

Petitioner concedes that the BMWD has authority to regulate the sale of surplus water in the best interest of the district members. However, there is no evidence that there was a need to retain such surplus' of water and there is no evidence that the sale of this water would have posed a threat to the supply of water needed for future use. Quite the contrary, the surplus far exceeded the amount necessary to sustain the District's future needs.

The BMWD's reasoning is further diluted by its arbitrary resolution to not sell the surplus water after clearly finding the sale to be in the best interest of the district members. The BMWD, in this case, has selectively displaced competition without any reasonable basis. Arbitrary regulation, without any recognizable benefit to the District as a whole, is not a reasonable exercise of authority. Thus, the District is not immune from antitrust liability under the *Parker* doctrine.

The Court of Appeal's decision did not consider the reasonableness of the BMWD's conduct in not selling the surplus water, particularly in light of the fact that it caused the Petitioners to lose their land and their water allocations through foreclosure.

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[5] California Water Code § 35425.

If its board deems it to be for the best interests of the district, a district may enter into a contact for the lease, sale, or use of any surplus water not then necessary for use within the district, for use either within or without the district.

III.

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE PETITIONERS' COMPLAINT.

The Court of Appeals reviewed the dismissal of Petitioners' antitrust claims, taking the factual allegations made by Petitioners as true. Appendix "B".

In reviewing a Federal Rule of Civil Procedure 12 (b) (6) dismissal, all allegations of material fact in the complaint are taken as true and are construed in the light most favorable to the non-moving party. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). Dismissal of a complaint under Rule 12 (b) (6) is improper unless, "it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99-102 (1957) (emphasis added); *Love, supra.*

This court has made it clear that a court should dismiss under Rule 12 (b)(6) only in rare circumstances. For the following reasons this petition should be granted to reconsider the material facts and legal theories put forth to this court in the light of antitrust liability and its exceptions.

CONCLUSION

The Court of Appeals decision as to State action immunity is based upon a factual finding left undecided in prior Supreme Court decisions. This case presents an opportunity for this Court to address the undisputed factual issue of whether the state action immunity doctrine and its case law progeny insulates private parties

who control the Board of Directors of a Water District, from antitrust liability for predatory anticompetitive behavior and from using the governmental process, as opposed to the outcome of that process, and to bring much needed certainty and uniformity to this area of the California Water Code and similar statutes.

The Petition for a Writ of Certiorari should be granted.

DATED: June 30, 1995.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FILED
JUL 15 1:33 PM '93
Clerk, U.S. District Court
Eastern District of California
By _____

DAVID R. HEDGECOCK, et al.,
Plaintiffs,
v.
BLACKWELL LAND COMPANY, INC., et al.,
Defendants.

CV-F 92-5886 OWW

MEMORANDUM OPINION GRANTING DEFENDANTS' MOTIONS TO DISMISS

I

INTRODUCTION

Defendants filed separate 12(b) (6) motions to dismiss[1] plaintiffs' complaint. The complaint alleges that defendants, along with unnamed co-conspirators participated in anticompetitive activities in violation of

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[1] Three separate motions were filed: one by Blackwell Land Company; one by Berrenda Mesa Water District; and one by the Paramount defendants.

Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2: by their conspiracy to eliminate competition through unfair business conduct; their attempt to monopolize farming and water entitlement within the Berrenda Mesa Water District; and to monopolize the market for water deliveries within the Berrenda Mesa Water District. Plaintiffs also advance several state law claims: intentional and negligent interference with prospective economic advantage; California Cartwright Act and Unfair Competition Laws, Cal. Bus. & Prof. Code §§ 16700-16760, 17000-17101, 17200-17208; breach of fiduciary duty with respect to defendant Berrenda Mesa Water District.

Defendants' motions to dismiss plaintiffs' federal antitrust claims must be granted. Exercise of supplemental jurisdiction over the state claims is unwarranted.

II

BACKGROUND STATEMENT

The plaintiffs[2] are individuals, corporations, a trustee, and a general partnership who own or lease land in the Berrenda Mesa Water District. All of plaintiff owners have agreed to detach their land from the District and sell their water allotment of 2.82 acre feet per acre. Defendant Berrenda Mesa Water District ("District"), is a California Water District organized and existing under

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[2] David Hedgecock, Rilda Hedgecock, William Roden, as trustee of the Ernest M. Still Trust, Roden Farms, a general partnership, Cal Farms Invest, Inc., a California corporation, Chandler's Palos Verdes Sand and Gravel, a corporation, Santa Fe Energy Resources Inc., a corporation, Gary Hamilton, and Susan Hamilton.

the California Water Code. The Paramount defendants[3] ("Paramount") are a limited partnership, corporations which are general partners in that limited partnership, and a corporation owning land located in Kern County, California. Defendant Blackwell Land Company, Inc. ("Blackwell") is a Delaware corporation owning land in Kern County. According to plaintiffs, Blackwell controls approximately 25% of the real property in the District and Paramount controls another 30% of the District's property. Together, they own and control over 55% of the real property in the District.

Agricultural water is furnished through the California State Water Project ("SWP"). SWP was established in 1960, under the California Water Resources Development Bond Act ("CWRDB"), California Water Code §12930 *et seq.*, for the purpose of constructing a State Water Resources Development System to distribute water to various parts of the state. SWP is administered by the California Department of Water Resources ("DWR"), pursuant to the CWRDB.

The Kern County Water Agency ("KWA") was created in 1961 for the purpose of acquiring water from the DWR for all of Kern County's member units. KWA acquired SWP water pursuant to a water supply contract with DWR, executed in 1963, which provides for annual deliveries of SWP water to Kern County. In turn, KWA enters into contracts with its member units for delivery of the SWP water supplied by DWR.

The District was created in 1963 under the California Water Code as a member unit of KWA. The District acquires SWP water from KWA pursuant to a water

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[3] Paramount Farming Company, L.P., a California limited partnership; Paramount Farming Enterprises, Inc., a Delaware corporation; Paramount Orchards Holdings, Inc., a Delaware corporation; Paramount Farms, Inc., a Delaware corporation.

supply contract with KWA executed in 1967, for the delivery of water on a permanent annual basis to the landowners within the District. Based on the District's annual supply of water under this contract, each landowner within the District is allotted 2.82 acre feet of water per acre of land per year.

The District has a Board of Directors comprised of five members, who are elected only by landowners in the District, not by the general population living within the District. The landowners are given one vote for every dollar of assessed value of land owned within the District. Cal. Water Code §§ 34700, 35003. Because the larger landowners receive a greater number of votes, they can exert greater influence over the election of Board members.

The California Water Code authorizes the Board to raise revenues by imposing standby charges, ad valorem taxes, and water tolls on landowners in the District. Cal. Water Code §§ 31031, 31032.1, 35470 and 37200. The District is also authorized to impose liens upon property for which standby charges and ad valorem taxes are delinquent and to cause foreclosure sales in order to satisfy such liens. Cal. Water Code §§ 36825, 36950 *et seq.*, 37050 *et seq.*, 37150 *et seq.*, 35479, and 37200 *et seq.*

The District is vested with power to sell water from its allotment in instances where the Board makes a determination that the water is "surplus" and it is in the best interest of the District to do so. Cal. Water Code §§ 35425 and 35604. Before a sale is approved, the District is required to hold hearings, submit a filing to the State of California, and circulate an "Initial Study and Proposed Negative Declaration" regarding any proposed water transfer.

III

STATEMENT OF FACTS

Plaintiffs essentially complain that defendants, as private parties and as de facto members of the District Board, are involved in a conspiracy to destroy plaintiffs' businesses, to monopolize the market for water deliveries within the District, and to destroy competition for water. This alleged conspiracy was principally carried out by the two largest landowners in the District, Blackwell and Paramount, who have been able to control the decisions of the District Board. Plaintiffs allege that the Board of Directors, at the direction of Blackwell and Paramount, has pursued the following course of action to destroy plaintiffs' businesses.

In 1986, the two largest landowners in the District were defendant Blackwell and Berrenda Mesa Farming, one of the unnamed co-conspirators who participated in the activities alleged in plaintiffs' complaint. At that time the District Board of Directors was comprised of two directors "hand-picked" by Blackwell, two directors "hand-picked" by Berrenda Mesa Farming, and a fifth director. This Board of Directors decided that approximately one-third of the District's maximum annual entitlement water, or 50,000 acre feet, was surplus to its long-term needs and that it was in the best interest of the District to sell this 50,000 acre feet.

In early 1988, the District took a series of steps to effectuate the sale[4] of 50,000 acre feet of its annual

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[4] On July 15, 1988, the District published Notice of Hearings with respect to this sale to Moulton Niguel, Santa Margarita, and Orange County Water Districts for $1,000 per acre foot, for a total sale price of 50 million dollars. The District also filed with the state clearing house its "Initial Study and Proposed Negative Declaration"

(continued)

entitlement water to the Moulton Niguel Water District, at $1000 per acre foot, for a total of 50 million dollars.[5]

Sometime after July, 1988, Paramount initiated negotiations with Blackwell and West Hills, one of the unnamed co-conspirators, for the purchase of land located within the District. According to plaintiffs, Paramount obtained assurances from these sellers that no sale of entitlement water would take place prior to Paramount's purchase. Pursuant to these negotiations, Paramount, Blackwell and West Hills agreed to oppose and obstruct any water sales from the District to others.

In October, 1988, defendants held a series of secret meetings in which they agreed to prevent the impending transfer of water to Moulton Niguel Water District. At a closed meeting of the Board of Directors on November 22, 1988, the Board representatives allegedly controlled by Blackwell and West Hills withdrew their support for the Moulton Niguel water transfer. An informal vote was held and the sale of water was terminated by a 4 to 1 decision.

In 1989, Paramount became the largest landowner within the District after purchasing substantial acreage from Blackwell and completing the purchase of West Hills' land. Paramount then removed two of the directors from the Board and replaced them with two of its own representatives. After these Board changes were made, Paramount and Blackwell each had two representatives on the Board of Directors, and therefore controlled four of the five Board votes.

(fn. continued)
regarding the proposed transfer and "took all steps necessary to sell water."

[5] Water is sold to the water districts at $77.00 per acre foot. The District's profits resulting from a sale of 50,000 acre feet, at $1,000 per acre foot, for a total of 50 million dollars would have been substantial.

In March, 1990, the Board held a public meeting in which they voted to suspend the Moulton Niguel water sale with the Paramount representatives and one Blackwell representative voting against the proposed sale.

On September 5, 1990, the Board approved another sale of 20,000 acre feet to Summit Valley Water District, for $1,000 per acre foot, for a total sale price of 20 million dollars. The sale was opposed by the Paramount representatives.

Paramount then threatened the Board with litigation over the proposed water sale and wrote to KWA, urging it not to approve the proposed sale. The pressure applied by Paramount resulted in a decision by the Board to cancel the proposed sale, carried by the votes of Paramount and one of the Blackwell Board representatives.

In October, 1991, the District Board set stand-by charges at $268 per acre and water tolls at $48 per acre for 1992. Plaintiffs complain that the Board decided to impose these fees on plaintiffs knowing that plaintiffs either do not use or do not profit from their use of District water.[6]

In 1992, the District Board rejected a petition submitted by four landowners to the Board requesting the sale of water. The Board then moved to notify landowners, delinquent in their assessments, of possible foreclosure proceedings being brought against them if assessments were not brought current. This action was approved with the two Paramount votes and one Blackwell vote.

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[6] Section 37300 of the California Water Code offers a procedure whereby disgruntled landowners may seek to have their land excluded from a water district by commencing official proceedings. While plaintiffs allege that they have consented to detach their land from the District, they do not claim to have commenced the appropriate exclusion proceedings.

In sum, plaintiffs allege that defendants sought to appoint a majority of the District Board of Directors (apparently through Paramount's acquisition of District land). These "defendant-controlled" Board members reached decisions which were motivated by the anticompetitive interests of defendants to the exclusion of the best interest of the District. The anticompetitive acts taken by the Board are: 1) the refusal to sell the District's surplus water that would result in substantial profits to all landowners; 2) the imposition of stand-by charges on plaintiffs; 3) the threatened foreclosure of plaintiffs' lands, as part of the overall conspiracy by defendants to gain access to water previously allocated to the foreclosed landowners.

IV

STANDARD FOR DISMISSAL FOR FAILURE TO STATE A CLAIM

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 2588 (1990).

In deciding a motion to dismiss, the court "must accept as true all material allegations in the complaint and construe them in the light most favorable to" the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *See generally*, Schwarzer, Tashima & Wagstaffe, CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL (TRG 1991) at ¶ 9:211 p. 9-39.

While the court generally must accept plaintiff's allegations as true, the court need not accept as true

allegations that contradict facts which may be judicially noticed. *Mullis v. United States Bank Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987), *cert denied*, 486 U.S. 1040 (1988). The court need not accept conclusory allegations, nor unreasonable inferences or unwarranted deductions of fact. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981).

V.

DISCUSSION

Defendants District, Blackwell and Paramount raise the following issues in their separate motions to dismiss:

1) State action immunity (all defendants);

2) *Noerr-Pennington* immunity (all defendants);

3) The Local Government Antitrust Act of 1984 (Blackwell and Paramount);

4) Failure to allege a proper "relevant market" (District);

5) Failure to allege "antitrust injury" (District);

6) Plaintiffs' state claims under California's Cartwright Act (Paramount); and

7) Dismissal of supplemental state claims if the federal claims are dismissed (District and Blackwell).

A. State-Action Immunity

The anticompetitive conduct alleged in plaintiffs' complaint can be grouped into the following categories: 1) an unlawful agreement by the private landowner defendants to ensure appointment of their own representatives to the Board in order to achieve a controlling

majority and to manipulate the decisions of the Board; 2) the Board members' refusal to sell surplus water irrespective of the best interests of the District; 3) the Board's decision to impose stand-by charges and water tolls on landowners within the District; and 4) the Board's decision to initiate foreclosure proceedings against landowners delinquent in their assessments.

All defendants contend they are immune from antitrust liability under the state action, or *Parker* immunity doctrine.

The state action immunity doctrine was first announced n *Parker v. Brown*, 317 U.S. 341 (1943), which upheld a California agricultural program that restricted the marketing of privately produced raisins, adopted pursuant to California's Agricultural Prorate Act. Relying on principles of federalism and state sovereignty, the Supreme Court held that the Sherman Act did not apply to anticompetitive restraints imposed by the States "as an act of government." *Id.* at 352.

Parker immunity does not apply directly to local governments or state agencies. *City of Columbia v. Omni Outdoor Advertising, Inc.*, __ U.S.__, 111 S.Ct. 1344, 1349 (1991); *Town of Hallie v. Eau Claire*, 471 U.S. 34, 38 (1985). The anticompetitive acts alleged here were carried out by the District at the direction of the private defendants, Blackwell and Paramount.

Anticompetitive conduct is protected by the *Parker* doctrine if it satisfies two requirements set forth in *California Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 105 (1980). First, "the challenged restraint must be clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105. Second, "the policy must be actively supervised by the State itself." *Id.* This prong is satisfied if state officials have and exercise their power to review particular anticompetitive acts of private parties and disapprove

those that fail to accord with state policy. *Patrick v. Burget*, 486 U.S. 94, 101 (1988). However, where the activities are carried out by a municipality performing a government function, the active supervision prong of the *Midcal* test need not be met. *Town of Hallie*, 471 U.S. at 46.

1. Clearly Articulated State Policy

The "clearly articulated" requirement is met where the State legislature authorizes the challenged action and the legislature articulates a policy to displace competition with regulation. *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591-92 (9th Cir. 1990). The delegating statute need not explicitly permit the displacement of competition. *City of Columbia*, 111 S.Ct. at 1350. It is enough "if suppression of competition is the 'foreseeable result' of what the statute authorizes." *Id.*, quoting *Town of Hallie*, 471 U.S. at 41-42.

The District Board actions of which plaintiffs complain are expressly authorized by the California legislature. Plaintiffs allege that the Paramount defendants entered into certain transactions for the acquisition of land within the District, for the purpose of placing Paramount representatives on the District Board of Directors. California law authorizes water district boards of directors to be comprised of landowners in the district. Pursuant to California law, the directors are selected by landowners in the district, who vote according to the assessed value of the land they own. Cal. Water Code §§ 34700, 35003. The fact that the Blackwell and Paramount, as the two largest landowners in the District, can successfully influence Board elections, is a

direct result of the voting scheme established by the Legislature.[7]

Plaintiffs also complain that the Board has imposed stand-by charges, taxes and water tolls on landowners in the District. The Board is expressly authorized by California law to impose standby charges, ad valorem taxes and water tolls on landowners in the District. Cal. Water Code §§ 31031, 31032.1, 35470 and 37200.[8]

Plaintiffs charge the Board with threatening to foreclose plaintiffs' properties for failure to pay assessments. Express statutory authority permits the District to impose liens upon lands in the District for which assessments are delinquent and to cause a foreclosure sale of such lands in order to satisfy such liens. Cal. Water Code § 36950 *et seq.*

Plaintiffs claim the principal means defendants have used to destroy plaintiffs' businesses, is their voting control over the Board to prevent the sale of District water. The effect of these decisions has been to deny plaintiffs substantial profits from water sales, which plaintiffs claim would be used to bring their assessments current and allow them to avoid foreclosure of their lands.

The District is vested with the power to sell water from its annual entitlement where it has made a determination that the water is "surplus" and it is in the best

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[7] This voting scheme was challenged and upheld by the Supreme Court in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). *See*, note 11, *infra.*

[8] Plaintiffs do not allege that the fees were imposed in violation of the Water Code, but that the water charges are unfair because plaintiffs do not use their allotment of water. California Water Code §§ 31031, 31032, provide for the imposition of these fees to cover the costs associated with the operation of the water district, whether the water is actually used or not.

interest of the district to do so. Cal. Water Code §35425. The Board's decision not to approve proposed water sales is at the very least a "foreseeable result" of the enactment by the California legislature of Water Code Section 35425. (*See, Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 519 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988) (where the Ninth Circuit held that the City's refusal to consent to the Water District's attempted water sale was contemplated by the State legislature and subject to *Parker* immunity. "The restriction of transfer is foreseeable within the authority of the city to contract for, acquire and hold water rights . . . .").

Plaintiffs do not refute that all of the District Board decisions complained of were authorized by and complied with California water law.

Next, defendants argue that the California Water Code evinces a clear and affirmative policy by the State of California to displace competition with regulation in the area of a water district's control over water and water rights. Plaintiffs counter that the California Water Code does not clearly articulate state policy to displace competition, but rather, that it demonstrates an intent by the State to encourage competition. Plaintiffs cite to a series of Water Code provisions which permit the sale, lease and other forms of transferring water and water rights.

Kern-Tulare, 828 F.2d at 519, holds that the California Water Code is a clear legislative articulation of a state policy to displace competition with regulation in the area of water distribution and water rights. In *Kern-Tulare*, the Ninth Circuit held that the City of Bakersfield was entitled to state action immunity for its refusal to permit a water district to sell certain water it had acquired from the City. *Id.* The Ninth Circuit reviewed California's constitutional and statutory provisions on water rights to conclude that this regulatory

framework "evinces a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of municipal control over water and water rights, so long as the municipality does not engage in waste or unreasonable use." *Id.* The Court explained that the City's refusal to consent to the water district's attempted transfer "is foreseeable within the authority of the city to contract for, acquire and hold water rights, to furnish itself and its inhabitants with water, and to sell, lease, exchange, or transfer surplus water." *Id.* at 519-20.

As plaintiffs contend, the State of California, through various provisions in the Water Code, encourages the transfer of water among its users under certain circumstances. These directives by the legislature, however, are not evidence of a state policy to encourage competition in a water market. The Water Code facilitates the transfers of "surplus" water, e.g., water not needed for city residents, or farming uses, in order to avoid waste and efficiently reallocate water to where it is most needed. For California, where water is a scarce and precious commodity, the Water Code evinces an unequivocal effort by the Legislature to regulate the allocation, distribution and use of its water resources to ensure that water is put to its most beneficial use and waste is avoided."[9]

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[9] Water Code § 100 enunciates the State's "general policy" with respect to water. It states, in pertinent part:

> [i]t is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented . . .

Cal. Water Code § 100

Plaintiffs' attempts to distinguish *Kern-Tulare* are not persuasive. Plaintiffs argue that the Ninth Circuit in *Kern-Tulare* based its decision on provisions of the Water Code dealing with municipalities and the conservation of domestic water use, which are not at issue in the present case. In fact, the Ninth Circuit's review of California law and the Water Code in *Kern-Tulare* was quite broad. The Court began by reviewing California's Constitution, Art. 10, § 2, and the Water Code's statement of general policy, § 100, to find that the purpose of the Legislature is to maximize the beneficial use and avoid waste of the State's water resources. The Court then surveyed numerous provisions of the Water Code, including the state's policy favoring water transfers. Water Code sections relied on by plaintiffs, §§ 109, 382, 475,[10] and many others were expressly considered by the Court. *See, Id.* at 519-20. For instance, the Court notes that,

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[10] The Water Code provisions cited by plaintiffs are consistent with California's policy, as stated in *Kern-Tulare*, 828 F.2d at 519, "to displace competition with regulation in the area of municipal control over water and water rights."

For instance, in Water Code § 109, the California Legislature "declares that the growing water needs of the state require the use of water in an efficient manner .... It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import."

Section 382, also cited by plaintiffs, empowers public agencies to "sell, exchange, or otherwise transfer water that is *surplus* to the needs of the agency's water users for use outside of the agency." (emphasis added).

The Costa-Isenberg Water Transfer Act, Water Code § 475, states that it "is the policy of this state to facilitate the voluntary sale, lease, or exchange of water or water rights in order to *promote efficient use*." (emphasis added).

> in empowering municipal corporations to: . . . (3) sell, lease, exchange or otherwise transfer surplus water, Cal. Water code § 382, the legislature contemplated that, in the exercise of those powers, cities might act by contract to preserve access to water for existing and future uses.

Id. at 520. After extensive analysis of California's constitutional and statutory framework for water rights, the Court concluded that California's policy is to displace competition with regulation in the are of water rights. *Id.* at 519.

Based on the *Kern-Tulare* decision and independent analysis of the California Water Code in this case, the Court finds the California legislature intended to displace competition with regulation in the area of water distribution and water rights. The Board's decision not to approve a proposed water sale is consistent with this regulatory scheme and is a foreseeable result of the State legislature's authorization to water districts for their sale of surplus water.

2. Active State Supervision

Under the second prong of *Midcal*, a party receives *Parker* immunity if the anticompetitive conduct is actively supervised by the State. The Supreme Court in *Town of Hallie*, 471 U.S. at 47, held that the "active supervision" prong of *Midcal* need not be imposed in cases involving anticompetitive conduct by a municipality. The Court reasoned that a municipality is unlike a private party engaging in anticompetitive activity, in which "there is a real danger that [the private party] is acting to further his own interests, rather than the governmental interest of the State." *Id.* The only real

danger foreseen by the Court in dispensing with the active supervision prong for municipalities, is that a municipality will seek to further purely parochial public interests at the expense of more overriding state goals. *Id.* at 47. However, this concern is minimized by the requirement of *Midcal* that the municipality act pursuant to a clearly articulated state policy. *Id.*

Defendants contend that *Town of Hallie* directly applies to the District, which is a "municipal entity" performing a governmental function, and thus, the District defendant need not satisfy the active supervision prong. Plaintiffs argue that defendants' reading of *Town of Hallie* is too broad because *Town of Hallie* merely held that the second prong does not apply to a city government, which the District is not. Additionally, plaintiffs argue that a water district has characteristics of a private actor that so distinguish it from other government entities to necessitate active state supervision over its anticompetitive conduct.

The District is not the municipality/ city government identified in *Town of Hallie*. The District does not provide general public services such as schools, utilities, roads, or anything else of the type ordinarily financed by a municipal body. Not all residents of the Districts are entitled to vote in the election of the Water District's Board members, only landowners. Its voting structure for members of the Board, limited to landowners according to assessed value of the land, is comparable to that of a corporation where the votes are distributed according to the number of shares owned.[11] Because the two

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[11] The same voting scheme, apportioning voting power according to land ownership at the exclusion of nonlandowning residents in the water district, was challenged in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), as being in violation of the Fourteenth Amendment's one person, one vote principle enunciated in *Reynolds v. Sims*. The Supreme Court in *Salyer* held

(continued)

defendant landowners own a majority of the land in the District and can exert great influence over Board elections, the District Board is arguably accountable only to these two landowners, as plaintiffs contend.[12] The defendant District is not a general purpose municipal government such as the municipality identified in *Town of Hallie*. However, the Ninth Circuit since *Town of Hallie*, has exempted entities other than municipalities from the active state supervision prong of *Midcal*.

In *Ambulance Service of Reno, Inc. v. Nevada Ambulance Services, Inc.* 819 F.2d 910, 913 (9th Cir. 1987), a Nevada charitable corporation (REMSA), was granted an exclusive franchise for ambulance services by the county district Board of Health, and was closely supervised by the Board. 819 F.2d at 912. The Ninth Circuit held that REMSA was merely an "instrument of

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(fn. continued)
that the Water District defendant is not subject to the *Reynolds* principle, and therefore the State need not show a compelling interest to justify the voting scheme, but that a rational basis justification would suffice. The water district was not subjected to the one person, one vote constitutional standard because of its special limited purpose and the disproportionate effect of its activities on landowners. *Salyer*, 410 U.S. at 728-29.

There is an undeniable tension between the *Salyer* decision declining to apply the *Reynolds* principle to a water district because it does not exercise "normal governmental authority," and defendants' position that the District need not satisfy the *Midcal* requirement of active State supervision on the ground that the District is a "municipal entity performing a governmental function." Defendants' argument has merit, nonetheless. As the dissent in *Salyer* states, "[i]t is hardly to be argued that a public body with the power to take by eminent domain, to issue bonds, to levy taxes, and to provide plans for flood control does not 'perform important governmental functions.' " 410 U.S. at 749.

[12] Plaintiffs contend that four out of the five Board members in the District are "hand-picked" Blackwell and Paramount. Consequently, these defendants exercise control over the Board's decisions.

the municipality" under *Town of Hallie*, and therefore active supervision by the state of Nevada was not required. *Id.* at 913.

Grason Elec. Co., et al. v. Sacramento Mun. Utility Dist., 770 F.2d 833 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), involved the Sacramento Municipal Utility District ("SMUD"), a public entity created under the California Public Utilities Code,[13] which is virtually the exclusive supplier of retail electricity in Sacramento. 770 F.2d at 835. The Ninth Circuit held that SMUD is a "municipal district" performing a "governmental function" which, under *Town of Hallie*, did not have to show active state supervision. *Id.* at 838.[14]

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[13] Section 12801 authorizes SMUD to

> acquire, construct, own, operate, control or use . . . works or part of works for supplying the inhabitants of the district . . . with light [and] power, . . . and may do all things necessary or convenient to the full exercise of the powers herein granted.

Cal. Pub. Util. Code § 12801.

[14] *Cf. Nugget Hydroelectric v. Pacific Gas and Elec.*, 981 F.2d 429, 435 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2336 (1993). In *Pacific Gas*, Pacific Gas & Electric Co., a California public utility that buys, sells and distributes electricity under the regulation of the California Public Utility Commission, was held immune from antitrust liability for anticompetitive acts, after passing scrutiny under both parts of *Midcal*: articulated state policy and active state supervision.

The municipal utility district in *Grason* is distinguishable from the public utility in *Pacific Gas*. Structurally, SMUD operates like a municipality because it is a creature of statue granted a broad range of municipal powers. For instance, under Cal. Pub. Util. Code, SMUD is empowered to sell bonds (§ 13091), to exercise the right of eminent domain (§ 12703), to tax (§ 12892), to annex territory into the district's boundaries (§ 13651). *Grason*, 770 F.2d at 837. By contrast, Pacific Gas & Electric is a corporation subject to state regulation through the California Public Utility Commission.

The District is a single-purpose governmental entity much like the municipal utility district in *Grason*. The District owes its existence entirely to the State legislature. The District performs governmental functions of water acquisition, allocation and distribution among all landowners in the District. The District is charged with maintenance of water facilities, and is thereby authorized to perform acts necessary or proper "to plan, construct maintain, improve, operate, and keep in repair the necessary works for production, storage, transmission, and distribution of water for irrigation, domestic, industrial, and municipal purposes." Cal. Water Code §§ 35400-35401. The District has the power to raise revenue for district purposes by levying and collecting acreage assessments. Cal. Water Code §§ 35470-35481. The District may impose liens upon lands for which assessments are delinquent and cause foreclosure sales in order to satisfy such liens. Cal Water Code §§ 36825, 36950 *et seq.*, 37050 *et seq.*, 37150 *et seq.*, 35479 and 37200 *et seq*. While the District does not have the broad-ranging police powers of a municipality, it has the authority to make rules and regulations regarding the distribution of water, and violation of such rules is punishable as a misdemeanor. Cal. Water Code §§ 35423, 35424.

The District is a local governmental unit, as a member unit of the Kern County Water Agency, which is defined as a public corporation under Cal. Water Code § 30065. "[P]ublic corporations in California — *water districts*, school districts, reclamation districts, etc. — are clearly considered governmental entities." *Keller v. State Bar of California*, 47 Cal.3d 1152, 1163, 255 Cal.Rptr. 542, 548 (1989), *rev'd on other grounds*, 496 U.S. 1 (1990) (emphasis added).

As a public entity performing a governmental function, the District need not meet the active state

supervision prong of *Midcal* under the Ninth Circuit's application of *Town of Hallie*.

Plaintiffs make no attempt to distinguish the Ninth Circuit case law which expands the applicability of *Town of Hallie* to entities other than municipalities. Plaintiffs instead argue that the active state supervision prong of *Midcal* is required not only for private parties, but is also applicable to government agents engaged in private activity. Plaintiffs contend that the District should be viewed as a private actor because it is financially interested in restraining competition and it acts as a commercial participant in a given market.

Plaintiffs first contend that the state action exemption does not apply to parties who have a financial interest in restraining competition. In support of this proposition, plaintiffs rely on an article by Professor Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 683 (1991), in which he argues that the exercise of governmental authority by financially interested officials should be treated as "private action" subject to antitrust review. Professor Elhauge's theory has not been adopted by the federal courts.[15] Moreover, none of the cases relied on by plaintiffs, cited in Professor Elhauge's article, suggest that *Parker* or *Noerr-Pennington*[16] antitrust immunities do not apply to the actions of a public entity on the ground that the agency or its officials were financially interested in the challenged action.

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[15] Contrary to plaintiffs' intimation, the Supreme Court did not approve the Elhauge theory espoused by plaintiffs in *City of Columbia v. Omni Outdoor Advertising, Inc.*, __ U.S. __, 111 S.Ct. 1344, 1351 (1991).

[16] The *Noerr-Pennington* doctrine provides antitrust immunity to private individuals engaged in efforts to restrain or monopolize trade by petitioning government officials.

Professor Elhauge's theory notwithstanding, the application of state action immunity does not depend on the subjective motivation of the District Board members. *See, City of Columbia*, 111 S.Ct. at 1351.

In *City of Columbia*, an advertising corporation, Columbia Outdoor Advertising ("COA"), which controlled more than 95% of the market and had close relations with city officials, lobbied these officials to enact zoning ordinances restricting billboard construction. The city's restrictions and COA were challenged by a competitor of COA. The competitor argued that governmental regulatory action may be deemed private — and therefore subject to antitrust liability — when it is taken pursuant to a conspiracy with private parties. *Id.* at 1348. The Court held that the existence of a conspiracy between a governmental entity and private parties does not create an exception to state action and *Noerr-Pennington* antitrust immunities. *Id.* at 1351, 1355. In doing so, the Supreme Court rejected the argument that *Parker* and *Noerr-Pennington* immunities should be limited to situations where the governmental action is taken by financially disinterested and politically independent actors. The Court explained that,

> Few governmental actions are immune from the charge that they are "not in the public interest" or in some sense "corrupt." The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a "conspiracy" to put the "private" interests of the State's raisin growers above the "public" interest of the State's consumers. The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners.

Id. at 1352; *See, Nugget Hydroelectric v. Pacific Gas and Elec.*, 981 F.2d 429, 434 (9th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2336 (1993) (citing *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985) (bad faith behind anticompetitive conduct of government officials does not defeat immunity; subjective motivation of the individual actors is irrelevant)).

Plaintiffs rely most heavily on two cases, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), cited in Professor Elhauge's article,[17] and *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 786

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[17] Plaintiffs also rely on the following cases cited in Professor Elhauge's article. These cases are not applicable to the District because they involve anticompetitive conduct by private parties.

In *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), the Canadian Government during World War II conferred authority upon a subsidiary of Union Carbide to purchase all vanadium products used by Canadian industries. The plaintiffs alleged that Union Carbide had wrongfully induced its subsidiary to purchase vanadium products only from Union Carbide, thereby excluding plaintiffs from participating in the Canadian market. The Supreme Court found that *Parker* immunity (and *Noerr-Pennington* immunity, discussed *infra*), did not exempt Union Carbide and its subsidiary from liability, because as private parties, they are "not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government." *Continental Ore*, 370 U.S. at 706.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the State Bar, a state agency, and the County Bar, a voluntary private association sought state action immunity for adopting minimum fee schedules for the member attorneys. The Supreme Court held that the State and County Bars were not immune from antitrust liability. Although the State Bar was an administrative agency of the Virginia Supreme Court for purposes of enforcing court rules and regulations, it acted as a private association in enforcing the minimum fee schedules. *Id.* at 792. Important to the Court's holding was the absence of a state-articulated policy to displace competition with the price floors which the State and County Bars had prescribed. *Id.* at 790-91.

F.Supp. 1518 (C.D. Cal. 1991), to argue that where private actors exercise effective control over the official decision-making body, no immunity attaches even though the decision is made by the governmental body. Plaintiffs contend that the Blackwell and Paramount defendants exercise such control over the District Board.

Neither *Allied Tube* nor *Sessions Tank* involve the acts of a public entity. Both cases apply the *Noerr-Pennington* doctrine to efforts by private parties to influence the setting of industry standards for private associations.

In *Allied Tube*, a manufacturer of polyvinyl chloride electrical conduits brought an antitrust action against a manufacturer of steel electrical conduits for conspiring to prevent inclusion of polyvinyl chloride conduit in the National Fire Protection Association's *National Electrical Code*. The Supreme Court held that efforts to influence the setting of a private association's product standards, which were routinely adopted by the state and local governments, did not qualify for *Noerr-Pennington* immunity. *Allied Tube*, 486 U.S. at 504. Rejecting the argument that the Fire Protection Association should be treated as a "quasi-legislative body," the Court held that antitrust immunity did not apply to the standards formulation procedures of a private association without official authority. *Id.*[18]

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[18] Certain ambiguity in the language employed by the Court in *Allied Tube* lends support to the plaintiffs' argument. The Court in *Allied Tube* said: "[t]he dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious," 486 U.S. at 501-02, to which the Court attaches a footnote discussing conspiracies among public and private actors.

The suggestion that antitrust immunity may not apply to government action which is heavily influenced by private parties was directly addressed and rejected in *City of Columbia*, the Supreme

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Similarly, in *Sessions Tank*, the district court following the *Allied* decision, held that efforts to influence the provisions of the Uniform Fire Code, adopted by the Western Fire Chiefs Association, a private association, were not immune from antitrust liability. 786 F.Supp. at 1530.

Next, plaintiffs argue that the state action immunity doctrine does not apply to acts of a public agency acting as a commercial participant in a given market, relying on dicta in *City of Columbia*, 111 S.Ct. at 1351.

In *City of Columbia*, the Court stated: "[the state action] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." 111 S.Ct. at 1351 (citing *Union Pacific R. Co. v. United States*, 313 U.S. 450, 461 (1941), a case relied on in *Parker*, which held unlawful under the Elkins Act certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities).

This possible exception to the state action immunity doctrine is not a rule of law, and the circuits addressing this argument in cases after *City of Columbia* have rejected a market participant theory as a basis for not

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Court's most recent opinion on state action immunity and the *Noerr-Pennington* doctrine. The *City of Columbia* Court expressly cites *Allied Tube* for fostering the possibility of a conspiracy exception to *Noerr* immunity. 111 S.Ct. at 1355. The exception would apply when government officials conspire with a private party to employ government action as a means of stifling competition. The Court concludes that "a conspiracy exception to *Noerr* must be rejected." *Id.*

granting state action immunity.[19] Moreover, the Ninth Circuit has upheld claims of antitrust immunity by governmental entities that were participants in the relevant markets. For instance, in *Kern-Tulare*, 828 F.2d at 519, state action immunity was held applicable to the City's refusal to permit a water district's sale to other districts. The defendant District here plays no greater role than the City in *Kern-Tulare* as an arguable participant in a state-wide "market"[20] for water under the regulatory scheme established by the California legislature. *See, also, Grason Electric*, 770 F.2d at 838 (anticompetitive actions of municipal utility district that was dominant participant in relevant market held entitled to antitrust immunity).

Whether the District is a participant in a given market, which plaintiffs have failed to clearly define, is not determinative of the immunity inquiry. State action immunity depends on the objective determination, which has been made here, that the State authorized the challenged activities and that there is a clear and express state policy to displace competition with regulation. These findings are sufficient to extend antitrust immunity to the District as a public entity performing a local governmental function.

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[19] *See, e.g., Allright Colorado v. City and County of Denver*, 937 F.2d 1502, 1510 (10th Cir.) *cert. denied*, __ U.S. __, 112 S.Ct. 587 (1991) ("[t]he City's additional status as a possible competitor, or its possible engagement in a "proprietary" activity, is not determinative"); *Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1312-13 (8th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 430 (1991) ("the market participant exception is merely a suggestion an is not a rule of law")

[20] It is difficult to characterize California's water distribution system as a "market" where water transfers require governmental approval.

The anticompetitive acts complained of here were effected through the defendant District, which is immune from antitrust liability under the state action immunity doctrine. Plaintiffs have not named the District Board members as defendants, but instead name Blackwell and Paramount, who have allegedly conspired to restrain trade "through their appointment of a majority of the Board of Directors and control of those Directors." To the extent plaintiffs attempt to attribute acts taken by the Board members to the private defendants, those acts are encompassed under the state action immunity doctrine.

The only private acts alleged are the conspiracy by Blackwell and Paramount to control Board actions. Blackwell and Paramount, as private actors, are not immune under the state action doctrine. They may, however, be protected from antitrust liability for acts intended to influence the actions of the District Board members under the *Noerr-Pennington* doctrine.

B. *Noerr-Pennington* Immunity

Defendants and certain unnamed co-conspirators are charged with having entered into various agreements to control the voting on the District's Board. The alleged private acts taken by Paramount and Blackwell, intended to control the decisions of the District's Board are: (1) secret meetings by defendants to influence proposed water sales (the underlying assumption is that, because defendants jointly own a majority of the land in the District, and thereby jointly control a majority of the Board members, their private agreements are implemented through the votes of their Board members); (2) Paramount's efforts to acquire land within the District (and therefore have greater influence over the election of the Board members); (3) a letter by Paramount to the Board of Directors threatening litigation over the

proposed water sale to Summit Valley; (4) a letter by Paramount to KWA advocating against approval of a water transfer.

The defendants' efforts resulted in: (1) the Board's refusal to authorize proposed sales of the District's permanent water entitlement; (2) the Board's setting of stand-by charges and water tolls; (3) the Board's threat of foreclosure proceedings against District landowners delinquent in their assessments.

Defendants contend they are immune from antitrust liability under the *Noerr-Pennington* doctrine for their efforts to influence the Water Board's actions, as governmental activity.[21] The *Noerr-Pennington* doctrine serves as a corollary to state action immunity. The doctrine provides antitrust immunity for "conduct of private individuals in seeking anticompetitive action from the government." *City of Columbia*, 111 S.Ct. at 1354. Whether a private party's political motives are selfish is irrelevant because " '*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.' " *Id.* (quoting *Pennington*, 381 U.S. at 670).

Noerr-Pennington immunity is not foreclosed to private parties who conspire with government officials to achieve the desired governmental action. *City of Columbia*, 111 S.Ct. at 1354 (Court rejects conspiracy exception to *Noerr-Pennington* immunity as it rejected such an immunity-destroying exception to *Parker*,). " 'It would be unlikely that any effort to influence legislative

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[21] The doctrine was introduced in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), where the Supreme Court held that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Pennington*, 381 U.S. at 670.

action could succeed unless one or more members of the legislative body became . . . co-conspirators' in some sense with the private party urging such action." *Id.* at 1355-56 (quoting *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975)).

Plaintiffs admit that the private acts of Paramount and Blackwell were efforts to influence or control the District Board decisions to refuse to sell District water, to impose stand-by charges and other fees, and to threaten foreclosure of plaintiffs' land for delinquent charges. Even if these actions were carried out pursuant to an agreement between the private defendants and certain Board members, *City of Columbia* dictates that *Noerr-Pennington* immunity still applies to shield the private defendants from antitrust liability.

Plaintiffs argue that the private defendants' acts are more than an effort to influence government action; rather that [*sic*] through defendants' control of the Water Board, the District is an "instrument to carry out their private interests." If plaintiffs complain that the decisions of the District are the result of collaboration between the private defendants and District Board members, their argument fails under *City of Columbia*, which rejects a conspiracy exception to *Noerr-Pennington* immunity. Plaintiffs certainly cannot contend that *Noerr-Pennington* immunity does not apply where the private party's efforts are successful.

Plaintiffs advance the argument that *Noerr-Pennington* immunity does not apply unless the lobbied government official is politically independent and financially disinterested. Plaintiffs rely on *Allied Tube, Sessions Tank Liners*, and *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), discussed above. Already noted, these cases reject the application of *Noerr-Pennington* immunity to parties engaged in lobbying efforts directed at private actors,

not governmental entities and their officials. Plaintiffs' contention fails because Paramount and Blackwell's actions were directed at the District, which is a public entity empowered by the California legislature to carry out the complained of acts.

Plaintiffs cite *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), as additional support for their argument that the private defendants cannot benefit from *Noerr-Pennington* immunity where the governmental entity is not politically independent, but is instead an instrument of the defendants' private goals.[22] *California Motor* invokes the "sham" exception to the *Noerr-Pennington* doctrine, which recognizes that private actors will not be immune from the antitrust laws where they are not in fact seeking official action by a governmental body, but instead, seek to harm or weaken competitors.[23]

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[22] *California Motor Transport* involved a group of trucking companies which were charged with conspiring to monopolize the transportation of goods by instituting state and federal proceedings to defeat applications by competitors to obtain operating rights. The Court found that a cause of action for antitrust violations was established where the trucking companies combined their efforts to harass and deter their competitors from having free access to the agencies and courts as a way of "building up one empire and destroying another." 404 U.S. at 515.

[23] It is difficult to view the defendants as plaintiffs' competitors seeking a competitive advantage through the manipulation of a governmental entity. Plaintiffs and defendants do not compete in the same agricultural market because the various parties are involved in different farming activities.

Plaintiffs argue that plaintiffs and defendants compete for the water distributed within the District. Plaintiffs claim that defendants seek a greater allotment of the water distributed within the District by foreclosing on the other landowners who receive water. Even if such a "market" for water distribution within the District exists, plaintiffs do not claim that they are being deprived of an adequate

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The sham exception covers situations in which "persons use the governmental process itself — as opposed to the outcome of that process — as an anti-competitive weapon." *City of Columbia*, 111 S.Ct. at 1354.[24] A "classic" example of this exception is "the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *Id.* (citing *California Motor*, 404 U.S. 508). *City of Columbia* explains that a sham situation involves a defendant "whose activities are 'not genuinely aimed at procuring favorable government action' at all," whereas *Noerr* immunity applies to one who "genuinely seeks to achieve his governmental result, but does so through improper means." 111 S.Ct. at 1354 (citations omitted).

Blackwell and Paramount's *Noerr-Pennington* immunity does not fail under the sham exception because the defendants' alleged activities were actually directed at the governmental entity, to achieve a desired result from the governmental entity. Blackwell and Paramount claim they sought to prevent the sale of District water to assure the District an adequate water supply through future droughts. The Board's refusal to approve water sales suggests that Blackwell and Paramount's efforts were successful. *City of Columbia* extends Blackwell and Paramount *Noerr-Pennington* immunity even if their

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share of this water as a result of the defendants' actions. In fact, plaintiffs do not use the water they are allotted, but seek to sell it to other governmental entities around the State.

[24] In *City of Columbia* itself, the Court found there was no "sham" where the defendant set out to disrupt the plaintiff's business "not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate product of that lobbying and consideration, viz., the zoning ordinances." *Id.*

ultimate goal is to weaken plaintiffs' businesses, so long as they sought to achieve this goal through governmental action.

C. Local Government Antitrust Act of 1984

Defendants Blackwell and Paramount contend that plaintiffs' damages claims against them are barred by the Local Government Antitrust Act of 1984 ("LGAA").

LGAA provides that no damages, interest, costs or attorney's fees may be recovered under the Sherman Act "from any local government, or official or employee thereof acting in an official capacity." 15 U.S.C. § 35(a). The term "local government" is defined in the Act to include "a school district, sanitary district, or any other special function governmental unit established by State law . . . ." 15 U.S.C. § 34(1)(B). Defendant District is clearly a "special function governmental unit." Plaintiffs state in their opposition they have not sued the District for damages, only injunctive relief. As to Blackwell and Paramount, plaintiffs may not recover antitrust damages from these private defendants for the acts carried out by the District, i.e., for the refusal to sell water, the imposition of assessments, and foreclosure on lands.

Under LGAA, damages claims are also barred against "a person based on any official action directed by a local government . . . ." 15 U.S.C. § 36. This provision of the Act prevents the recovery of antitrust damages against private defendants for acts taken at the direction of the governmental agency. *See, e.g., IT&E Overseas, Inc. v. RCA Global Communications, Inc.*, 747 F.Supp. 6, 13 (D.D.C. 1990) (citing H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4603) (LGAA eliminates the damage remedy against private persons acting at local

governmental direction); *City Communications, Inc. v. City of Detroit*, 660 F.Supp. 932, 936 (E.D. Mich. 1987) (private defendants acting under official supervision are protected from damage claims under LGAA).

Plaintiffs are arguably not barred by LGAA from recovering damages against defendants Blackwell and Paramount for the private acts alleged, because such acts were not taken in any official capacity or under the direction of the District as official Board acts. However, this issue need not be decided because defendants are otherwise immune from federal antitrust liability for the acts alleged in plaintiffs' complaint.

For the same reasons, it is unnecessary to determine whether plaintiffs' federal antitrust claims adequately allege the relevant product and geographic markets, and antitrust injury under Section 1 and 2 of the Sherman Antitrust Act.

VI

CONCLUSION

Plaintiffs have failed to state a federal claim upon which relief may be granted because defendants are immune from federal antitrust liability for the acts alleged in plaintiffs' complaint. Defendants' motions to dismiss plaintiffs' federal antitrust claims are GRANTED without leave to amend.

All that remain are supplemental state claims for intentional and negligent interference with prospective economic advantage, violation of the California Cartwright Act and Unfair Competition Laws, and declaratory relief against the District for breach of fiduciary duty. Because all claims over which this Court has original jurisdiction have been dismissed, and the

state courts have the specialized knowledge to deal with the complex and unique nature of California's water district law and the activities complained of, the Court declines to exercise supplemental jurisdiction over the state claims. 28 U.S.C. §§ 1367(c)(1), (3) and (4); *Les Schokley Racing v. National Hot Rod Ass'n*, 884 F.2d 504, 509 (9th Cir. 1989). These remaining claims are dismissed without prejudice.

SO ORDERED.

DATED: July 14, 1993.

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA
July 15, 1993

* * CERTIFICATE OF SERVICE * *

1:92-cv-05886

Hedgecock
v.
Blackwell Land Co

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 15, 1993, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Deputy Clerk

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 7 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DAVID HEDGECOCK
Plaintiff,
and
WILLIAM RODEN, as Trustee of Ernest M. Still Trust; RODEN FARMS, a General Partnership; CAL FARM INVEST, INC.; CHANDLER'S PALOS VERDES SAND AND GRAVEL, a corporation; SANTA FE ENERGY RESOURCES, INC, a corporation; GARY HAMILTON; SUSAN HAMILTON,
Plaintiffs-Appellants,
v.
BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO. L.P., a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,
Defendants-Appellees.

C.A. No. 93-16604
D.C. No. CV-92-05886-OWW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted February 16, 1995
San Francisco, California

Before: HUG, FARRIS, and POOLE, Circuit Judges.

We review de novo the dismissal of plaintiffs' antitrust claims, *Oscar v. University Students Coop. Ass'n*, 965 F.2d 783, 785 (9th Cir.) (en banc), *cert. denied*, 113 S.Ct. 655 (1992), taking the factual allegations made by the plaintiff as true. *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1054 (9th Cir. 1994). We affirm.

I. State Action Immunity

The Sherman Act does not apply to anticompetitive restraints imposed by the States "as an act of government." *Parker v. Brown*, 317 U.S. 341, 352 (1943). Although "*Parker* immunity does not apply directly to local governments," *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991), local governments may nonetheless qualify for *Parker* immunity where they are acting with state authority under a "clearly expressed state policy" to displace competition with regulation. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985). To qualify as "clearly articulated," the statute expressing state policy need not explicitly permit the displacement of competition. *City*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

of Columbia, 499 U.S. at 373. It is enough that the allegedly anticompetitive conduct "is the 'foreseeable result' of what the statute authorizes." *Id.* (quoting *Town of Hallie*, 471 U.S. at 42).

A. Plaintiffs contend that *Parker's* threshold requirement of a clearly articulated state policy replacing competition with regulation is not satisfied. In *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988), we concluded that California had "a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of municipal control over water and water rights, so long as the municipality does not engage in waste or unreasonable use." *Id.* at 519. Plaintiffs would have the court distinguish *Kern-Tulare* on the ground that the case involved a city's "*sovereign* activities" rather than "private parties controlling a water district to create for themselves a monopoly on inexpensive water supplies which can be resold at a profit." The proposed distinction is without substance.

Plaintiffs' allegations of wrongdoing by private parties to control the district do not change the nature of the actions taken (and not taken) by the district. The refusal to sell "excess" water and the imposition of standby charges and ad valorem taxes are actions explicitly contemplated by the California Water Code. *See* Cal. Water Code §§ 31031, 31032.1, 35470, and 37200 *et seq.*; *Kern-Tulare*, 828 F.2d at 519 ("City's refusal to consent to the District's attempted transfer [was] contemplated by the legislature"). Plaintiffs' argument, focused on the anticompetitive *motive* of the district, is a reformulation of a proposed "conspiracy" exception already rejected by the Supreme Court. *See City of Columbia*, 499 U.S. at 379 ("we reaffirm our rejection of any interpretation of the Sherman Act that would allow

plaintiffs to look behind the actions of state sovereigns to base their claims on perceived conspiracies to restrain trade") (quotation omitted). Application of the state action immunity does not turn on a factual examination of whether the water district acted "for private gain" or "in the public interest." *City of Columbia*, 499 U.S. at 378. Under the California Water Code the district's refusal to sell allegedly excess water, and the concomitant increase in standby charges, is a foreseeable result of the state's delegation of these powers to local water districts. *See Kern-Tulare*, 828 F.2d at 519-520.

B. Next, plaintiffs contend that the district court erred in concluding that the water district was not required to demonstrate active state supervision to qualify for *Parker* immunity. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (in addition to policy being "clearly articulated," the policy must be "actively supervised by the State itself") (quotation omitted).

In *Town of Hallie*, the Supreme Court held that the active state supervision requirement "should not be imposed in cases in which the actor is a municipality." 471 U.S. at 46. Our decisions since *Town of Hallie*, have not required active state supervision of other limited purpose government entities similar to the water district. *See Ambulance Service of Reno, Inc. v. Nevada Ambulance Services, Inc.*, 819 F.2d 910 (9th Cir. 1987) (no active state supervision required for charitable corporation acting as instrument of municipality); *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833 (9th Cir. 1985) (no active state supervision required for utility district created by municipality), *cert. denied*, 474 U.S. 1103 (1986).

Plaintiffs contend that the conclusion was erroneously based on a factual finding in conflict with the allegations of the complaint. Although we must accept plaintiffs'

factual allegations, we need not "accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Plaintiffs contend that the district court disregarded their allegations that the district was acting as a "commercial actor" furthering "anticompetitive practices rather than legitimate government" and its decisions "were extraneous to the proper exercise of its powers as a public entity."

The allegations of illegitimate motive are not relevant to the application of *Parker* immunity. *See City of Columbia*, 499 U.S. at 377-79. Having acknowledged that the district is a "public entity" their argument that the district has improperly abandoned the public interest is not a basis to impose the active state supervision requirement.

C. Finally, plaintiffs contend that because the district was acting as a "commercial participant" in an antitrust conspiracy with Blackwell, Paramount and other unnamed coconspirators, it is not entitled to *Parker* immunity.

In *City of Columbia*, the Supreme Court referenced a "possible market participant exception" without deciding there was one. 499 U.S. at 379. Likewise, the Eleventh Circuit's decision in *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931 (Fed Cir. 1993), *cert. denied*, 114 S.Ct. 1126 (1994), did "not decide whether the [University of California's] licensing activities establish a market participant exception to State Action immunity." *Id.* at 949. While a commercial participant exception to *Parker* might be appropriate in circumstances where an arm of the state enters a market in competition with private actors, *see, e.g., Union Pac. R.R. v. United States*, 313 U.S. 450 (1941), such is not the case here. Plaintiffs contend that the district acted as a commercial

participant in its "decisions regarding the purchase, sale, price, marketing, distribution and allocation of water." Plaintiffs are not in competition with the district, rather they feel the economic effect of the district's decisions concerning the refusal to sell allegedly excess water to other districts. These effects are a direct result of decisions explicitly delegated to water districts by the state pursuant to a scheme of water regulation. *See Kern-Tulare*, 828 F.2d at 520.

II. *Noerr-Pennington* Immunity for Blackwell and Paramount

As a corollary to *Parker*, the *Noerr-Pennington*[1] doctrine exempts from federal antitrust laws "conduct of private individuals in seeking anticompetitive action from the government." *City of Columbia*, 499 U.S. at 379-80.

Plaintiffs rely primarily on *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 (1988) for the proposition that Blackwell's and Paramount's efforts do not qualify for *Noerr-Pennington* immunity because "the lobbied government official is [not] politically independent and financially disinterested."

Plaintiffs' reliance on *Allied Tube* is misplaced. Plaintiffs allege harm that stemmed directly from decisions of the water district not to sell water and to impose standby charges. Unlike the plaintiffs in *Allied Tube*, plaintiffs have not alleged "that [they] sustained injuries from anything other than the actions of municipal authorities." *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir.), *cert. denied*, 115 S.Ct.

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[1] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

66 (1994). If accepted, plaintiffs' theory would require the district court to investigate the considerations motivating the water district's decision not to sell excess water. Such "deconstructing" of the water district's decision making process would "run[] afoul of the principles guiding the *Parker* and *Noerr* decisions." *Id.* at 300.

Plaintiffs' allegations do make out a case that the defendant landowners acted in their own self interest in bringing about water district decisions favorable to them and detrimental to the plaintiffs. However, it is beyond the scope of the antitrust laws "to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials." *City of Columbia*, 499 U.S. at 383.

AFFIRMED.

No. 95-23 (2)

Supreme Court, U.S.
FILED
AUG 03 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

WILLIAM RODEN, as Trustee of Ernest M. Still Trust; RODEN FARMS, a General Partnership; CAL FARM INVEST, INC., a California corporation; GARY HAMILTON, an individual; SUSAN HAMILTON, an individual,

Petitioners,

vs.

BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO. L.P., a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT BERRENDA MESA WATER DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER (1) STATE ACTION IMMUNITY PROTECTS A CALIFORNIA WATER DISTRICT FROM FEDERAL ANTITRUST LIABILITY WHEN IT PERFORMS ACTS WHICH IT IS AUTHORIZED TO PERFORM PURSUANT TO PROVISIONS OF THE CALIFORNIA WATER CODE, AND WHETHER (2) STATE ACTION IMMUNITY AND THE *NOERR PENNINGTON* DOCTRINE PROTECT THE LANDOWNERS WHOSE REPRESENTATIVES SERVE ON THE WATER DISTRICT'S BOARD PURSUANT TO PROVISIONS OF THE CALIFORNIA WATER CODE FROM FEDERAL ANTITRUST LIABILITY WHEN THEY SEEK OFFICIAL ACTION FROM THE WATER DISTRICT.

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STATEMENT OF THE CASE

Respondent Berrenda Mesa Water District ("BMWD") respectfully requests that this Court deny the petition of William Roden, Roden Farms, Cal Farm Invest, Inc., Gary Hamilton and Susan Hamilton (hereinafter "petitioners") for writ of certiorari.

Petitioners in this federal antitrust action[1] are unhappy with decisions by the BMWD to impose standby charges and ad valorem taxes, foreclose or threaten to foreclose on lands where assessments are delinquent, and to cancel approval for proposed sales of portions of the water district's permanent water entitlement. Petitioners concede that all of the conduct at issue was authorized by and complied with the provisions of the California Water Code.

The relevant facts have been set forth in the opinion of the district court. Petition, Appendix A at pp. 2-9. As stated therein, the BMWD is an entity duly organized under the California Water Code.[2] Petition, Appendix A

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[1] Petitioners' complaint also raised pendent state law claims of intentional and negligent interference with prospective economic advantage, violation of the California Cartwright Act and unfair competition laws, and declaratory relief against the BMWD for breach of fiduciary duty. The district court declined to exercise supplemental jurisdiction over these remaining claims and dismissed them without prejudice.

[2] The California Water Code devotes hundreds of pages of provisions to the formation of water districts and to their internal organization, elections, powers and purposes, finances, assessments, and the levy, collection and enforcement of district assessments. Cal. Water Code §§ 34000-38999. Pursuant to the provisions of the Code, the BMWD has been given power to perform all acts necessary or proper "to plan, construct,

at pp. 2-3. Under the Code the BMWD is explicitly authorized to impose standby charges,[3] ad valorem taxes, and water tolls on landowners in the district. Cal. Water Code §§ 31031, 31032.1, 35470 and 37200 *et seq.* The BMWD is also expressly authorized to impose liens upon property for which standby charges and ad valorem taxes are delinquent and to cause foreclosure sales in order to satisfy such liens. Cal. Water Code § 36825, §§ 36950 *et seq.*, §§ 37050 *et seq.*, §§ 37150 *et seq.*, § 35479, and §§ 37200 *et seq.* The BMWD is vested with power to sell portions of its maximum annual entitlement where it has made a determination that it is in the best interests of the district to do so. Cal. Water Code §§ 35425, 35604.

Under the Code, the Board of the BMWD is comprised of five members elected by landowners in the district. Each member of the Board must be a holder of title to land in the district, or the representative of a corporation holding land in the BMWD. Cal. Water Code § 34700. The Board is elected by landowners who vote according to the assessed value of the land they own in the district. Cal. Water Code § 35003.

For purposes of the motions to dismiss brought by respondent BMWD and by the landowner respondents,

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maintain, improve, operate, and keep in repair the necessary works for production, storage transmission, and distribution of water for irrigation, domestic, industrial, and municipal purposes." Cal. Water Code §§ 35400-35401.

[3] The standby charges of which petitioners vigorously complain (Petition at pp. 8-9) were instituted in 1985. Appendix A attached hereto, ¶22. Standby charges are "to pay the debt service, administration costs, and fixed costs of the [State Water Project]." *Id.*, ¶21.

the facts alleged in petitioners' complaint were accepted as true, including unsubstantiated allegations concerning "secret agreements," "closed meetings," "threatened litigation" and an alleged "conspiracy" pursuant to which the BMWD Board voted to cancel approval of proposed sales of portions of the BMWD's permanent water entitlement to the Moulton Niguel and Summit Valley Water Districts. A copy of petitioners' complaint is appended hereto as Appendix A.

The district court below found that respondent BMWD was immune under state action immunity, and that the landowner respondents were immune under the *Noerr Pennington* doctrine. Petition, Appendix A. The Ninth Circuit unanimously affirmed that decision, holding that the BMWD was immune from petitioners' federal antitrust claims under the state action immunity doctrine, and that the landowner respondents Blackwell Land Company, Paramount Company L.P. and its affiliated companies (hereinafter collectively the "landowner respondents") were immune from petitioners' federal antitrust claims under the *Noerr Pennington* doctrine. Petition, Appendix B.

Petitioners now argue with respect to the landowner respondents that the "sham exception" to the *Noerr Pennington* doctrine prevents finding the landowners immune under that doctrine, and that the "active supervision" requirement for private actors seeking to establish state action immunity prevents finding the landowners immune under state action immunity. Petition at pp. 11-16. With respect to respondent BMWD, petitioners now contend that the district was required to

show a "not unreasonable exercise of authority" to establish state action immunity. Petition at pp. 16-20.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Petitioners have not presented any issues warranting review by this Court. Nor have petitioners cited any cases evidencing that the opinion of the district court and the unanimous opinion of the Ninth Circuit affirming that decision conflict in any way with the decisions of this Court or any appellate court. Nor have petitioners demonstrated that the decisions below are erroneous. To the contrary, the courts below engaged in a lengthy review of California water law and fundamental principles of federal antitrust law, and faithfully and correctly adhered to this Court's settled precedents governing state action immunity and the *Noerr Pennington* doctrine. For these reasons, the writ petition should be denied.

ARGUMENT

I. PETITIONERS FAIL TO RAISE ANY ISSUES WARRANTING REVIEW.

A. The "Active Supervision" Requirement For Establishing State Action Immunity For Private Actors Does Not Raise An Issue Warranting Review.

Petitioners' argument that the Ninth Circuit erred in not addressing the "active supervision" requirement for

finding state action immunity as to the landowner respondents does not raise an issue warranting review. To the extent that the landowner respondents are immune under the *Noerr Pennington* doctrine, as the Ninth Circuit held below, "active supervision" is not required to establish immunity under that doctrine. Since, moreover, the conduct complained of, *i.e.*, the imposition of standby charges and ad valorem taxes, the institution of foreclosure proceedings, and decisions concerning sales of surplus water, are official actions carried out by the BMWD, "active supervision" is, as petitioners concede, not required. Petition at p. 19; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) (active supervision need not be shown by municipalities performing governmental functions). For these reasons, petitioners' contention that the Ninth Circuit erred by failing to address whether there was "active supervision" with respect to surplus water sales is unavailing.

Contrary to petitioners' assertions, furthermore, even if a showing of "active supervision" had been required, there was sufficient evidence of such supervision. The "active supervision" prong of *Midcal* permits private parties to claim state action immunity when the challenged conduct is "actively supervised by the State itself." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1985). This is satisfied if " 'state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.' " *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (decisions by a private utility held to be "actively supervised" where the decisions were reviewed by state officials).

Here, the sale of the scarce commodity of water is a public matter scrutinized and heavily regulated by state authorities. As petitioners' complaint alleges, in connection with a proposed water transfer the BMWD must hold hearings and submit a filing to the state of California, and must circulate an "Initial Study and Proposed Negative Declaration." Appendix A attached hereto, ¶31. Under the regulatory scheme, the Kern County Water Agency ("KCWA"), a subdivision of the state of California, holds hearings on proposed transfers of State Water Project entitlement. Petition, Appendix A at pp. 5, 7. County and state approval is required for contracts entered into by the BMWD for water transfers. Appendix A attached hereto, ¶¶27-28, 42. Accordingly, even assuming "active supervision" applied to the landowner respondents, which it does not, petitioners' statement that "there is not even the potential for state supervision" over surplus water sales (Petition at p. 15) is wholly inaccurate and this issue does not warrant review.[4]

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[4] Although decisions *not* to transfer a portion of the district's water entitlement are not reviewed, this does not equate to the absence of "active supervision" over the water district since it would be both impractical and unreasonable for the state to delegate powers and authority to local governmental entities, and to at the same time actively supervise every decision by local governmental entities not to exercise those powers. There are an infinite number of such negative "decisions."

B. Petitioners' Argument That the BMWD's Conduct Constituted an "Unreasonable Exercise of Authority" Does Not Raise An Issue Warranting Review.

Petitioners' argument, based on language found in a Texas district court case called *Santos v. City of Houston, Texas*, 852 F. Supp. 601, 605-607 (S.D. Tex. 1994), that the Ninth Circuit erred in failing to consider the reasonableness of the BMWD's conduct in not selling surplus water, also lacks merit. Petitioners misstate the law with respect to establishing state action immunity for a municipality when they assert:

> A "state action exemption," as pronounced in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct 307 (1943), may apply to a municipality when: (1) the state legislature has "clearly articulated and affirmatively expressed" a state policy granting the municipality the power to legislatively displace competition within a particular regulated area; *and* (2) *the municipality has not unreasonably exercised such authority.*

Petition at pp. 17-18 (emphasis added).

Petitioners here incorrectly seek to require a municipal entity seeking state action immunity to show that the challenged conduct constitutes a "not unreasonable exercise of authority." This proposed additional requirement for state action immunity has never been set forth in the decisions of this Court.[5] To the contrary, the well established requirement for a municipality seeking state action

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[5] The cases cited by petitioners (*Community Communication Co. v. City of Boulder*, 455 U.S. 40, 51 (1982) and *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 409 (1977)) do not set forth

immunity, which was applied by the Ninth Circuit in the case at bar, is that a municipal entity show that the allegedly anticompetitive conduct is a "foreseeable result" of the state's regulations. *Town of Hallie*, 471 U.S. at 38-39, 42, 47; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991). Petitioners' proposed requirement, *i.e.*, that a municipality show a "not unreasonable exercise of authority," would seriously undermine state action immunity; as this Court stated in *Town of Hallie*, federal courts should not become "embroil[ed] . . . in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny." 471 U.S. 34 at n.7.

Nor has petitioners' proposed requirement been addressed by this Court. Petitioners incorrectly state that "[t]his Court, in *Indep. Taxi v. Greater Houston*, 474 U.S. 903, 106 S. Ct. 231 (1985), addressed the issue of reasonableness in exercise of authority" (Petition at p. 19). Far from addressing that issue, this Court in *Arrow Northwest, Inc., et al. v. Greater Houston Transportation Company*, 474 U.S. 903 (1985), denied a petition for certiorari to review a Fifth Circuit decision of *Independent Taxicab Drivers Employees, et al. v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985). Furthermore, while the Fifth Circuit observed in that case that the conduct at issue was not an unreasonable exercise of authority, the Fifth Circuit there reiterated this Court's rule that the conduct at issue need only

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any additional requirement that a municipality show that it "has not unreasonably exercised its authority."

be a foreseeable result of the state's regulations. *Id.* at 610 citing *Town of Hallie,* 105 S. Ct. at 1719. The Fifth Circuit also, analogous to the case at bar, found that Texas had delegated the management of both private carriers and airports to the state's municipalities through statues directed towards these ends, and that the City of Houston was immune with respect to its decision to confer the privilege of airport taxicab operation on a single company. *Id.* at 611.

Even if it were necessary for a municipal entity seeking state action immunity to demonstrate that its conduct constitutes a "not unreasonable exercise of authority," the facts recited by petitioners themselves evidence that the BMWD acted in a reasonable manner with respect to cancelling the proposed sales of portions of the water district's permanent water entitlement. Petitioners ignore the facts alleged in their own complaint when they contend in their brief that:

> . . . [t]he BMWD action in arbitrarily not selling surplus water is not achieving the current objective which is to act in the best interest of the district and its members.
>
> . . .
>
> . . . there is no evidence that there was a need to retain such surplus' [sic] of water and there is no evidence that the sale of this water would have posed a threat to the supply of water needed for future use. Quite the contrary, the surplus far exceeded the amount necessary to sustain the District's future needs.

Petition at pp. 19-20.

The BMWD acted reasonably because, as petitioners state in their brief, there are no other viable sources of water for farming within the BMWD. Petition at p. 4. The proposed sales at issue were of significant portions of the water district's permanent water entitlement (*i.e.*, as much as one-third of the district's future water supply). Petition, Appendix A, pp. 5, 7. As petitioners state in their complaint, the cancellation of approval of the proposed sales of portions of the water district's permanent water entitlement was done with the "intent of insuring the maximum water entitlement to BMWD so that even in drought years the defendants would have adequate water supplies." Appendix A attached hereto, ¶58c. Although the proposed sales of portions of the water district's permanent water entitlement would have been a windfall and benefit for the individual petitioners themselves who want to abandon farming,[6] it is certainly reasonable for the district to consider and act to insure that landowners within the district will have adequate water supplies for drought years. The water district's exercise of its discretion under the statute, particularly in view of the severe drought conditions in California during the years when the decisions were made, to cancel approval for the proposed water sales cannot be said to be an "unreasonable exercise of authority."

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[6] It is by no means certain that all other necessary approvals would have been obtained and all regulatory requirements would have been met with respect to the proposed sales of substantial portions of the BMWD's permanent water entitlement, or that the proposed transactions would ultimately have gone forward.

Petitioners' reliance on *Santos v. City of Houston, Texas*, 852 F. Supp. 601 (S.D. Tex. 1994), which bears no similarity to the case at bar, to argue that the BMWD's conduct was not exercised in a reasonable manner is also misplaced. That case involved a 1924 ordinance expressly prohibiting certain specific types of jitney service in the City of Houston.[7] The district court found that the specific prohibitions of the ordinance no longer served their original purpose of protecting streetcars from competition, had randomly and arbitrarily been enforced by the city, and violated substantive due process and equal protection rights under the federal constitution. *Id.* at 606-609. The City of Houston's random enforcement of a specific prohibition in an unconstitutional ordinance (nearly seventy years after its enactment) is not analogous to the water district's exercise of its discretion pursuant to a California Water Code provision, the constitutionality of which is not at issue, not to approve proposed sales of significant portions of the water district's permanent water entitlement.

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[7] The ordinance at issue was a 1924 antijitney ordinance which (1) prohibited jitney service on streets with streetcar tracks and (2) banned jitneys with seating capacity of less than 15 passengers. *Id.* at 603. The first clause of the ordinance was obsolete because there were no remaining streetcar tracks in the City of Houston. The second clause of the ordinance effectively banning all jitney operations in the city had been enforced only randomly. *Id.* The ordinance was challenged on federal constitutional and antitrust grounds by a taxicab driver who had allegedly been threatened by city officials under the ordinance with loss of his license.

II. THE NINTH CIRCUIT CORRECTLY FOUND THAT STATE ACTION IMMUNITY PROTECTED RESPONDENT BMWD FROM ANTITRUST LIABILITY.

As set forth in the Ninth Circuit's decision, state action immunity was first announced in *Parker v. Brown*, 317 U.S. 341, 352 (1943). State action immunity applies to anticompetitive restraints imposed by states "as an act of government." *City of Columbia*, 499 U.S. 365, 111 S. Ct. 1344, 1348-1349 (1991) (quoting *Parker*, 317 U.S. at 352). The doctrine is based on principles of federalism and state sovereignty. *Id.*

State action immunity also applies to actions of political subdivisions of a state where those actions are an authorized implementation of state policy. *Id.*; *see also, e.g., Town of Hallie*, 471 U.S. 34 (municipality immune); *Grason Electric Co., et al. v. Sacramento Municipal Utility District*, 770 F.2d 833 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986) (municipal utility district immune). To qualify for state action immunity, a municipal entity performing a governmental function need only show that it is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. *See, e.g., Town of Hallie*, 471 U.S. at 47.

Here, the Ninth Circuit straightforwardly applied this standard to the BMWD's conduct and correctly held, as other courts have before, that the California Water Code has a clearly articulated and affirmatively expressed state policy to displace competition with regulation and that decisions relating to surplus water sales are immune under state action immunity. *See, e.g., Kern-*

Tulare Water District v. City of Bakersfield, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988) (city immune from antitrust liability for decision not to sell surplus water). The State of California's constitution provides that the use of water is subject to the regulation of and control of the state, *see* Cal. Const. Art. 10, § 5, and all of the conduct of the BMWD which is challenged by petitioners is either explicitly authorized or a foreseeable result of the California Water Code's express provisions. *See* Cal. Water Code §§ 34700, 35003 (landowner representation); Cal. Water Code §§ 31031, 31032.1, 35470 and § 37200 *et seq.* (standby charges and ad valorem taxes); Cal. Water Code § 36950 *et seq.* (liens and foreclosure proceedings); Cal. Water Code §§ 35425, 35604 (discretion to approve surplus water sales when in the "best interests" of the district).[8]

Even assuming petitioners' unsubstantiated allegations of conspiracy, there is no exception to state action immunity for allegedly "conspiratorial" conduct. In *City of Columbia*, this Court explicitly considered and rejected

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[8] The actual imposition of standby charges and ad valorem taxes, and of liens and foreclosure proceedings for delinquent assessments, is a foreseeable result of state policy; the state necessarily anticipated the water district would impose standby charges and ad valorem taxes, and liens where assessments were delinquent, when it explicitly so provided in the California Water Code. Similarly, the state of California necessarily foresaw that the water district would refuse to approve proposed water sales to preserve the district's future water supply when the state enacted California Water Code § 35425 authorizing such sales only when the water was deemed to be "surplus" and the proposed transfer was in the "best interests of the district."

the argument that there should be a "conspiracy" exception to either state action immunity or the *Noerr Pennington* doctrine based on corruption, bad faith, or abandonment of public responsibility to private interests. 111 S. Ct. at 1352, 1355. There, this Court unequivocally held that there could be no exception to state action immunity based on alleged "secret anticompetitive agreements" between private citizens and government officials. *Id.* at 1352.

Nor is there a "financial interest" exception to state action immunity. Such an exception would be contrary to the case which is the cornerstone of the state action immunity doctrine, *i.e.*, the *Parker* Court itself held that a state's requirement that a raisin marketing program be approved by referendum of financially interested raisin producers did not destroy antitrust immunity. There, plaintiff raisin producer challenged a marketing program approved by raisin producers owning 51% of the acreage devoted to production of the raisins in the statutory proration zone. 317 U.S. at 347. The *Parker* Court held that antitrust immunity applied to the statewide raisin marketing program because the state had authorized the establishment, through the action of state officials, of such programs for the marketing of agricultural commodities. The Court stated that "[t]he prerequisite approval of the program upon referendum . . . is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits." *Id.* at 352.

Nor are there any cases in the area of water regulation from this Court or any appellate court which petitioners have cited which are inconsistent with the case at

bar. To the contrary, finding the BMWD immune from antitrust liability is entirely consistent with the holdings of the Ninth Circuit and other circuits addressing antitrust immunity in the area of water regulation.[9]

III. THE NINTH CIRCUIT CORRECTLY FOUND THAT THE *NOERR PENNINGTON* DOCTRINE PROTECTED THE LANDOWNER RESPONDENTS FROM ANTITRUST LIABILITY.

As set forth in the opinions of the Ninth Circuit and the district court below, the *Noerr Pennington* doctrine renders the federal antitrust laws inapplicable to the conduct of private individuals seeking anticompetitive action from the government. *See, e.g., City of Columbia*, 111 S. Ct. at 1354. The doctrine was set forth in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657

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[9] *See, e.g., Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988) (city immune from antitrust liability for decision not to sell surplus water); *McCallum v. City of Athens, Georgia*, 976 F.2d 649, 651 (11th Cir. 1992) (the city of Athens' operation of a waterworks was immune from antitrust liability for alleged Sherman Act violations based on increased rates charged to nonresidents of the city of Athens, and on alleged agreements with the neighboring public utility authority to divide markets); *Falls Chase Special Taxing District v. City of Tallahassee*, 788 F.2d 711 (11th Cir. 1986) (city's allegedly anticompetitive legal challenge to the issuance of a construction permit exempt from federal antitrust laws); *Auton v. Dade City, Florida*, 783 F.2d 1009 (11th Cir. 1986) (city immune from antitrust prosecution by plaintiff water well contractors who contended that the city's ordinance prohibiting drilling of private water wells within the city limits violated the antitrust laws).

(1965). This Court expressly held in *Noerr* that the Sherman Act should not be construed to "disqualify people from taking a public position on matters in which they are financially interested . . . " 365 U.S. at 139. Similarly, this Court expressly held in *Pennington* that the fact that a party's private political motives are selfish is irrelevant since "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U.S. at 670 (1965).

The fact that the landowner respondents have representatives who serve on the BMWD board is a direct result of explicit provisions of the California Water Code, which has been found constitutional in this respect in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) (approving on constitutional grounds the election of the board of California water districts based upon "one acre one vote"). To the extent that landowner respondents or other landowners within the district have sought to influence the water district's decisions with respect to imposing assessments, foreclosure proceedings, and the sale of the water district's permanent entitlement, those activities are legitimate political activities under the *Noerr Pennington* doctrine. *See, e.g., Federal Prescription Serv., Inc. v. American Pharmaceutical Assn.*, 663 F.2d 253, 264 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982) (lobbying of state pharmacy boards composed of pharmacists held to be immune from federal antitrust liability despite allegations that boards acted in their commercial self-interest, because their function and composition is determined by state law). To hold otherwise would be to ignore the fact that the Sherman Act

was not meant to regulate political activity. *Id.* citing *Parker*, 317 U.S. 341; *Noerr*, 365 U.S. 127.

Petitioners' argument for the first time in their petition before this Court that the "sham exception" applies and prevents finding the landowner respondents immune does not raise an issue warranting review. As set forth in the decision of the district court below (Appendix A at pp. 30-32), and in Paramount's Brief In Opposition To Petition For Certiorari filed concurrently with this opposition, the "sham exception" does not apply to genuine efforts to secure government action. Since petitioners alleged in their complaint that the landowner respondents successfully secured government action from the BMWD, the newly raised "sham exception" is not applicable. For these reasons, and for the reasons set forth more fully in the Brief of Respondent Paramount in Opposition to Petition For Writ of Certiorari filed concurrently with this opposition, the Ninth Circuit correctly found that the *Noerr Pennington* doctrine protects the landowner respondents.

IV. THE NINTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' COMPLAINT.

Petitioners miscast as antitrust violations actions taken by the BMWD which are authorized by and in full compliance with the California Water Code, and which are part of the state's comprehensive regulatory scheme for the allocation of water. The nature of the allegedly anticompetitive conduct and the extensive regulatory

scheme authorizing that conduct renders antitrust immunity appropriate and any amendment of petitioners' complaint would be futile. For these reasons, the Ninth Circuit's affirmance of the district court's 12(b)(6) dismissal was proper.

CONCLUSION

For all the reasons set forth above, petitioners have presented no persuasive reason for this Court to review the decision of the Ninth Circuit unanimously affirming the decision of the district court and the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID G. HEDGECOCK, RILDA R. HEDGECOCK, WILLIAM RODEN, as Trustee of the Ernest M. Still Trust, RODEN FARMS, a General Partnership, CAL FARM INVEST, INC., a California Corporation, CHANDLER'S PALOS VERDES SAND AND GRAVEL, a Corporation, SANTA FE ENERGY RESOURCES, INC., a Corporation, GARY HAMILTON, and SUSAN HAMILTON Plaintiffs	CASE NO. CV-F 92-5886-OWW **COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF** FEDERAL ANTITRUST: 1. Unfair Business Conduct 2. Attempt to Monopolize 3. Monopolization

vs.

BLACKWELL LAND COMPANY, INC., a Delaware Corporation; PARAMOUNT FARMING COMPANY, L.P., a California limited partnership; PARAMOUNT FARMING ENTERPRISES, INC., a Delaware Corporation; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware Corporation; PARAMOUNT FARMS, INC., a Delaware Corporation; BERRENDA MESA WATER DISTRICT, a California State Water District

Defendants.

PENDENT STATE CLAIMS:

4. Tortious Interference
5. Negligent Interference
6. Cartwright Act
7. Declaratory Relief

DEMAND FOR JURY TRIAL

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Plaintiffs allege:

I

INTRODUCTION

This case involves one of the most important issues in California today – water. The defendants are certain entities who conspired under the color of official titles as members of the Board of Directors of a Water District to commit unfair business practices against less powerful and often, small farmers to deny them the rights under the law. They did this by secret agreements to control votes and to thus capture water and land for themselves. All of these agreements were in violation of Federal and State laws. Further, the statutes under which these defendants operate violate the Constitutional rights of the plaintiff.

II

JURISDICTION AND VENUE

1. This Court has jurisdiction under the Sherman Act, 15 U.S.C. §7, and the Clayton Act, 15 U.S.C. §§15 and 26, to enjoin the activities of defendants hereinafter recited, and to recover damages, costs, and attorney's fees, sustained by plaintiffs by reason of defendants' violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2. The Court also has jurisdiction under the principles of pendent jurisdiction.

2. Venue is proper in this District Court, pursuant to 28 U.S.C. §1391(b) and 15 U.S.C. §22 in that the plaintiffs and all of the defendants are doing business in and own property in this district, and the activities of the defendants which gave rise to the claim for relief and the damages occurred in this district.

III

PLAINTIFFS

3. Plaintiffs DAVID G. HEDGECOCK and RILDA R. HEDGECOCK are, and at all times herein mentioned were, individuals who owned land in the BERRENDA MESA WATER DISTRICT ("BMWD") for the business purpose of farming. Plaintiffs own 20.0 acres in the non-service area of BMWD and consents to detach their land from BMWD and sell their water allotment of 2.82 acre feet per acre.

4. Plaintiff WILLIAM RODEN, as Trustee of the Ernest M. Still trust owns, and at all times herein mentioned owned land in the BMWD for the business purpose of farming. Plaintiff owns approximately 935 acres on which it defaulted on BMWD stand-by charges and has been threatened with loss of its land through foreclosure sale. In 1990, plaintiff consented to detach its land from BMWD and sell its water allotment of 2.82 acre feet per acre.

5. Plaintiff RODEN FARMS is, and at all times mentioned was, a general partnership duly organized and existing under the laws of the State of California, and leases 1,364 acres from the Earnest M. Still Trust for the business purpose of farming. RODEN FARMS is responsible for the payment of stand-by charges under the terms of its lease and has paid in excess of $400,000 in stand-by charges for which it did not order or receive any water.

6. Plaintiff CAL FARM INVEST, INC. is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, which owns land in the BMWD for the business purpose of farming. Plaintiff owns approximately 1,700 acres, on which it defaulted on BMWD stand-by charges and has been threatened with loss of its land through foreclosure sale. Prior to defaulting on stand-by charges, plaintiff paid in excess of $900,000 in stand-by charges for which it did not order or receive any water. In 1990, plaintiff consented to detach 2,170 acres of its land from BMWD and sell its water allotment of 2.82 acre feet per acre.

7. Plaintiff CHANDLER'S PALOS VERDES SAND AND GRAVEL is, and at all times herein mentioned was a California corporation which owned land in the BMWD for the business purpose of farming. Plaintiff owns 80 acres and in 1990, consented to detach its land from BMWD and sell its water allotment of 2.82 acre feet per acre.

8. Plaintiff SANTA FE ENERGY RESOURCES, INC. is, and at all times herein mentioned was, a corporation which owns land in the BMWD. Plaintiff has paid in excess of $300,000 in stand-by charges for which it did not order or receive any water. Plaintiff owns approximately 400 acres in the BMWD and consents to detach its land from BMWD and sell its water allotment of 2.82 acre feet per acre.

9. Plaintiffs GARY HAMILTON and SUSAN HAMILTON are individuals who own land in the BMWD for the business purpose of farming. Plaintiffs own approximately 40 acres in the BMWD and consents to detach their land from BMWD and sell their water allotment of 2.82 acre fee per acre.

IV
DEFENDANTS

10. Defendant BLACKWELL LAND COMPANY, INC. ("BLACKWELL") is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of Delaware, and is authorized to transact, and is transacting business in California, with its principal place of business in this state; and

at all times herein mentioned owned land in Kern County, California.

11. Defendant PARAMOUNT FARMING COMPANY, L.P., ("PARAMOUNT") is, and at all times herein mentioned was, a California Limited Partnership, certified with the Secretary of State, with is principal place of business located in this state; and at all times herein mentioned owned land in Kern County, California.

12. Defendants PARAMOUNT FARMING ENTERPRISES, INC. ("PFE") and PARAMOUNT ORCHARDS HOLDINGS, INC. ("POH") are, and at all times herein mentioned were, general partners in the partnership known as PARAMOUNT, and are sued herein both individually and as partners in said partnership. PFE and POH are, and at all times herein mentioned were, corporations duly organized and existing under the laws of the State of Delaware, and are authorized to transact, and are transacting business in California, each with its principal place of business in this state; and at all times herein mentioned owned land in Kern County, California.

13. Defendant, PARAMOUNT FARMS, INC. ("PFI") is, and at all times herein mentioned was, a corporation duly organized and existing under the State of Delaware, and is authorized to transact, and is transacting business in California, with its principal place of business in this state; and at all times herein mentioned owned land in Kern County California.

14. Defendant, BERRENDA MESA WATER DISTRICT ("BMWD") is, and at all times herein mentioned was, a California State Water District duly organized and existing under the California Water District Law. It is

named here solely as a defendant in connection with the request for injunctive relief and declaratory relief and no damages are sought from this defendant. Accordingly, no statutory claim has been filed against them for any type of monetary damages.

V

UNNAMED CO-CONSPIRATORS

15. There are numerous unnamed co-conspirators, aiders and abettors and others who participated directly or indirectly in the activities alleged in this complaint. Three of those entities are BERRENDA MESA FARMING ("BMF"), WEST HILLS COOPERATIVE, INC. ("WHC"), and A & P RANCH, a California Limited Partnership ("A & P"). Other co-conspirators include certain employers or agents of named defendants as well as certain partners in named partnerships. Bach contributed directly or indirectly to the losses caused to the plaintiffs.

VI

OVERVIEW OF TRADE AND COMMERCE

A. BASIC STRUCTURE OF WATER SUPPLY AND GENERAL MARKET PLACE

16. In 1960 the California Water Resources Development Bond Act, California Water Code §12930 *et seq.*, provided for the California State Water Project ("SWP"). The object of this act was the construction of a State Water Resources Development System, including an aqueduct system to distribute water to various parts of the state. Pursuant to the California Water Resources

Development Bond Act, the SWP is administered by the California Department of Water Resources ("DWR").

17. The KERN COUNTY WATER AGENCY ("KCWA") was created in 1961, coterminous with the boundaries of Kern County, for the purpose of acquiring water supplies for its member units from the DWR. On or about November 15, 1963, a water supply contract was executed between DWR and KCWA providing for annual deliveries of SWP water to KCWA on a permanent annual basis.

18. BERRENDA MESA WATER DISTRICT ("BMWD") was organized in 1963 in an area of Western Kern County. On or about March 9, 1967, a contract was executed between KCWA and BMWD for a permanent annual water supply from KCWA to BMWD.

B. BERRENDA MESA WATER DISTRICT AND GEOGRAPHIC MARKET

19. BMWD was formed on the basis of DWR figures for the projected costs of agricultural water from the SWP. The DWR figures projected that an acre foot of water would cost $23 in 1985 and $24 in 1990. An acre foot of water actually cost the farmer $77.67 in 1985, (237.7 percent more than projected); and in 1990 an acre foot actually cost $92.00 (383 percent more than projected). KCWA approved a transfer of additional water to BMWD from a purchase of 50,000 acre feet of water from Semitropic Water Storage District and amended its water supply contract between KCWA and BMWD on or about June 4, 1971, to provide for an annual supply of water to BMWD, beginning in 1990, of 155,100 acre feet. By 1979, the

BMWD consisted of approximately 55,000 acres. Based on the annual firm entitlement to BMWD, landowners within BMWD were entitled to approximately 2.82 acre feet of water per acre of land per year.

C. POWERS OF BMWD BOARD OF DIRECTORS

20. The BMWD Board of Directors is comprised of five members selected by the landowners within the district. Voting representation is one vote for every dollar of assessed value for land owned within the district, pursuant to Water Code §35003.

21. BMWD is empowered to charge the following costs against landowners within the district:

(1) Stand-by charge per acre, to be levied on all lands in the service area whether receiving water or not. This charge is to pay the debt service, administration costs, and fixed costs of the SWP.

(2) Ad Valorem Assessment of $6.00 per $100 assessed value, resulting in a $3 per acre tax levy on all lands in the BMWD, whether receiving water or not; and

(3) Water tolls based on water actually received. The water tolls are comprised of two components as follows:

(a) Base Water Toll for each acre foot of water delivered to a landowner which pays for all BMWD operational costs other than power and SWP variable costs; and

(b) Power Costs, which pay for BMWD power costs for pumping and SWP variable costs, which vary depending upon the particular

pumping plants serving an area and the turnout location from State Water Project facilities.

D. POWER TO IMPOSE LIENS

22. BMWD also is empowered to impose a lien against land on which stand-by charges and ad valorem assessments are delinquent and to cause a foreclosure sale of such properties in order to satisfy such liens. At all times relevant to this action up until 1990, BMWD assessed stand-by charges to all landowners in the service area regardless of whether water was available or used by the landowner.

23. The enormous increases in the costs of state water drove almost all row crop farmers out of business in BMWD. In or about December 1984, BMWD began to experience major delinquencies in payment of the stand-by charges as well as payment of the ad valorem assessments and water tolls. Many of the row crop farmers went under because they could not afford the costs of water, and over 6,800 acres of row crop land was in default by 1985. By 1988, over 8,000 acres of row crop land was in default.

24. On or about July 24, 1985, the BMWD Board of Directors passed Resolution No. 537, which contained the following financial provisions:

> *Section 6: Ad Valorem Taxes.* Annually, BMWD shall levy an ad valorem tax sufficient to produce an average of $3.00 per assessable acre within BMWD for the purpose of contributing to

and payment of the bond service costs of BMWD.

Section 7: Basic Water Tolls In Non-Stand-by Years. In any year in which BMWD receives at least 1.5 acre feet of water per acre of land in the Service Area of BMWD and water orders *equal or exceed* BMWD's contract entitlement for such year or the amount of water available for such year, whichever is less, no stand-by charge shall be imposed and the balance of all fixed costs and all variable costs, exclusive of variable pumping costs as described in Section 11 hereof, shall be raised by means of a basic uniform water toll for all water delivered during such year.

Section 8: Stand-by Charges. In any year in which BMWD receives at least 1.5 acre feet of water per acre of land in the Service Area of the District and water orders are *less* than BMWD's contract entitlement for such year or the amount of water available for such year, whichever is less, the balance of all BMWD's fixed costs for said year shall be raised by a uniform stand-by charge to be levied upon all lands in the Service Area of BMWD.

This resolution also provided that in years in which a stand-by charge is imposed, all variable costs of BMWD for that year, exclusive of the incremental pumping costs, shall be raised by means of a basic uniform water toll for all water delivered by BMWD for such year.

E. PROPOSED SALE OF WATER

25. In or about early 1986, the largest landowners within the BMWD were Defendants BLACKWELL and

BMF. The BMWD Board of Directors was composed of two directors hand picked by Defendant BLACKWELL, two directors hand picked by defendant BMF, and one other director. The Board decided that approximately one-third of its maximum annual entitlement, or 50,000 acre feet, was surplus to its long-term needs, and that it should sell that portion of its SWP entitlement if a buyer could be found.

26. On or about March 6, 1986, the BMWD Board of Directors sent a letter to every water district in Kern County, to KCWA and to the DWR, stating that the Board of Directors, acting pursuant to the powers vested in it by Section 35604 of the Water Code, and all other statutes in such case made and provided, had made the determination that it was in the best interest of the District to sell approximately 50,000 acre feet of its maximum annual entitlement from the SWP. This letter also advised that if no district or combination of districts in Kern County was prepared to purchase this water at its market value, BMWD intended to offer this water for sale outside Kern County. The letter also noted the then recent decision of KCWA that KCWA could not fix the price of water when transferred; and BMWD's belief that KWCA would not attempt to impose territorial restraints on the policy of the State of California and DWR that there be a free market in water.

27. On or about May 7, 1986, the BMWD Board of Directors communicated with the director of DWR, to advise him of BMWD's wishes to sell water and to inquire about DWR approval. The Director of DWR advised the directors that DWR would approve the sale.

28. On or about November 13, 1986, KCWA set a hearing on the subject of proposed transfers of SWP entitlement. All five BMWD directors authorized the transfer of the 50,000 acre feet of the BMWD maximum annual entitlement. On or about February 26, 1987, BMWD sent a letter to KCWA urging approval of the water transfer.

29. In or about 1987, BMF opposed the sale of BMWD water which its representatives on the board of Directors had previously approved. BMF had permanent crops (vines and trees) on all of its land in BMWD. As a result, BMF used all of its water allocation and could not directly benefit from selling water. BMF would benefit if water was not sold, since some farmers could not farm because of the cost of the water and therefore were unable to use their water allocation. BMF would gain use of this extra water without extra stand-by charges. In addition, the sale of water would result in a smaller allocation to BMWD. If no sale occurred it would result in added water available to those landowners in BMWD in later years.

30. In early 1988, negotiations for a sale by BMWD of the 50,000 acre feet of annual entitlement water began with the Moulton Niguel Water District, at the direction of the BMWD Board of Directors. Several Memorandums of Understandings were exchanged by the parties with the contemplation that a final Memorandum of Understanding would be executed in late August 1988.

31. On or about July 15, 1988, BMWD published notice of hearings on the sale of 50,000 acre feet of its annual entitlement to Moulton Niguel, Santa Margarita,

and Orange County Water Districts, for $1000 per acre foot, for a total sale price of $50 million. At the same time, BMWD filed with the State clearing house and circulated its Initial Study and Proposed Negative Declaration" regarding the proposed transfer and took all steps necessary to sell water.

F. UNLAWFUL ACTS OF DEFENDANTS

32. Prior to 1988, BLACKWELL entered into various agreements with certain unnamed co-conspirators to act in concert in voting on the BMWD Board. One or more of those co-conspirators were BERRENDA MESA FARMING, WEST MILLS COOPERATIVE, INC., and A & P. At a time unknown to plaintiffs, they entered into agreements to act in concert with the intent to harm the plaintiffs as set forth below.

33. Plaintiffs are informed and believe that sometime after July, 1988, PARAMOUNT entered into negotiations with WEST HILLS for the purchase by PARAMOUNT of WEST HILLS' agricultural land located in the BMWD. Plaintiffs are further informed and believe that a critical term of the negotiations was that PARAMOUNT be assured that it had an adequate supply of water for such lands and that a condition to any such sale would be that BMWD not allow the sale of any water to which the landowners therein were entitled.

34. Plaintiffs are informed and believe that sometime shortly after PARAMOUNT centered into negotiations with WEST HILLS, PARAMOUNT entered into

negotiations with defendant BLACKWELL for the purchase by PARAMOUNT of acreage located in BMWD from BLACKWELL for approximately $50 million and entered into various illegal agreements set forth below.

35. On various occasions in October 1988 defendants met secretly in a series of closed meetings in violation of the Ralph M. Brown Act (Government Code Section 54950, et seq.) to discuss the sale of water to the Moulton Niguel Water District. The defendants decided in such secret sessions that irrespective of the best interests of the District they did not want to sell water to the Moulton Niguel Water District and that regardless of the recommendation of the Berrenda Mesa Water District's counsel, they would not pursue the proposed transfer.

36. On or about November 22, 1988, the BMWD Board of Directors met in closed session to discuss the water transfer. At this meeting, contrary to their previous positions, the BLACKWELL and WEST HILLS representatives on the Board withdrew their support of this proposed water transfer and expressed a desire to put the water sale on permanent hold all in agreement with coconspirators. An informal vote was held and the sale of water was terminated by a 4 to 1 decision.

37. In or about 1989, defendant PARAMOUNT bought the holdings of WEST HILLS. Shortly thereafter, PARAMOUNT completed purchase of acreage from BLACKWELL in the BMWD, thereby becoming the largest landholder in BMWD. The WEST HILLS representatives on the BMWD Board of Directors were replaced by PARAMOUNT representatives.

38. On or about September 15, 1989, PFI sent a letter to BMWD to report acquisitions by its affiliates of various properties within BMWD, including land owned by WEST HILLS and BLACKWELL; and to insure that two PARAMOUNT representatives would be on the BMWD Board of Directors.

39. In or about March 1990, at a BMWD board meeting, the directors publicly passed a motion to suspend the water sale, with the PARAMOUNT representatives and one BLACKWELL representative voting for no water sales. Acting under color of state law, defendants' decision to suspend the water sale constituted an intentional deprivation of plaintiffs' substantial property rights in violation of plaintiffs' due process rights under the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the California Constitution in that since the decision to put the water sale on permanent hold had been made on November 22, 1988, plaintiffs' opportunity to be heard on the issue in March 1990 was not at a meaningful time or in a meaningful manner. Rather, the public hearing aspect of that decision was merely perfunctory in nature.

40. On or about August 21, 1990, BMWD Board of Directors decided on a three to two vote to again market surplus water. The vote was opposed by the two PARAMOUNT representatives on the board. Shortly thereafter and on or about September 5, 1990, the BMWD Board of Directors approved a Memorandum of Understanding approving sale of 20,000 acre feet to Summit Valley Water District ("Summit Valley") for $1,000 per acre foot for a total sale price of $20 million. This vote was opposed by the PARAMOUNT representatives on the Board.

41. On or about September 5, 1990, PARAMOUNT and A & P sent a letter to BMWD threatening litigation for damages and injunctive relief against BMWD directors who voted to approve the sale of water to Summit Valley.

42. On or about September 17, 1990, a BMWD director and one of the PARAMOUNT and A & P representatives sent a letter to KCWA urging that it not approve the sale and threatening to nullify the Summit Valley transaction through any available means should it be approved.

43. Thereafter, BLACKWELL representatives on the BMWD Board of Directors concurred with PARAMOUNT to delay the approved transfer of water to Summit Valley.

44. On or about August 20, 1991, the BMWD Board of Directors met. BLACKWELL and the PARAMOUNT representatives voted to cancel the Summit Valley Memorandum of Understanding and the vote was carried three to one with one BLACKWELL representative being absent.

45. On or about October 15, 1991, the BMWD Board of Directors set stand-by charges at $268 per acre for 1992, and water tolls at $48 per acre foot.

46. On or about April 18, 1992, PARAMOUNT sent a letter to BMWD indicating that it had available for transfer 12,840 acre feet of water out of Belridge Water Storage District. 1,240 acre feet of this amount would go to Lost Hills Water District and the rest into the BMWD water supply. PARAMOUNT requested that this approximately 11,600 acre feet of water be carried over in PARAMOUNT's name.

47. On or about June 16, 1992, four landowners in the BMWD brought a petition to the Board of Directors to sell water. The Board of Directors disregarded this pursuant to a secret pact and moved to send a letter to BMWD landowners delinquent in their assessments, indirectly threatening a foreclosure action if the assessments were not brought current. The two PARAMOUNT directors and the one BLACKWELL director who was present voted in favor of this action, and this action was carried.

48. On or about June 19, 1992, BMWD sent a letter to delinquent landowners indirectly threatening to reinstate foreclose proceedings on their properties if assessments were not brought current. These foreclosure proceedings had been tolled since August 21, 1990.

VII

MONOPOLY POWER

49. Defendant PARAMOUNT currently controls and farms approximately 15,668 acres in the BMWD service area (over 30% of the property in the service area) and approximately 1,964 acres in the BMWD non-service area. Defendant BLACKWELL currently controls and farms over 12,761 acres in the BMWD service area (almost 25% of the property in the service area) and approximately 2,556 in the BMWD non-service area. Together they own and control over 55% of the property in the service area.

VIII

CONCEALMENT OF AGREEMENTS

50. Defendants intentionally concealed the fact that they had secret agreements not to allow the sale of water

by BMWD landowners, as well as other agreements all directed at harming other landowners in BMWD. Plaintiffs did not discover this fact until September, 1992, when it was disclosed that defendants, PARAMOUNT and BLACKWELL, had agreements to cooperate as described in the complaint. Plaintiffs remained in ignorance of such facts through no fault of their own until September, 1992.

IX

ANTITRUST INJURY

51. In 1992, there are approximately 55,000 acres in BMWD. Approximately 6,800 acres have been foreclosed and reclaimed by BMWD. Another approximately 6,100 acres are in default on stand-by charges. Another 5,600 acres are in the non-service area with Ad Valorem taxes owing. Approximately 35,000 acres are stand-by acres in the service area entitled to receive water.

52. By reason of the aforesaid illegal and unlawful conduct and as a direct and proximate result of such conduct, the plaintiffs have been injured by their loss of profits and loss of monies due to excessive payments of stand by charges and taxes all through the loss of right to sell water. Said losses shall be set forth below.

X

FIRST CLAIM FOR RELIEF

CONSPIRACY TO ELIMINATE COMPETITION BY UNFAIR BUSINESS CONDUCT - RULE OF REASON ILLEGALITY UNDER SHERMAN ACT SECTION 1

53. Plaintiffs incorporate herein by reference all of the above, as though fully set forth herein.

54. Plaintiffs own land in the BMWD for the business purpose of farming said land. Said land is not useable for farming purposes, unless it receives irrigation water through the BMWD. Plaintiffs invested substantial amounts of money in said land and entered BMWD in order to engage in the business of farming.

55. The acts alleged in this first claim for relief to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction or control of its affairs and acting on its behalf within the scope of their employment.

56. Beginning sometime in or about 1988, and continuing thereafter at least until the present, the exact date of beginning to the plaintiffs being unknown, the defendants entered into an unlawful conspiracy and constraint of the aforesaid interstate commerce and farming business in violation of 15 U.S.C. §1, commonly known as the Sherman Antitrust Act.

57. The aforesaid conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants to embark upon a plan and

scheme, individually and in conspiracy with others, to compete unfairly with plaintiffs, to force plaintiffs into default on BMWD assessment charges and fees, and to foreclose upon plaintiffs, thereby obtaining their water rights for their own use; and to prevent the sale of BMWD water, in order to prevent plaintiffs from obtaining a profit, and to destroy plaintiffs as competitors for BMWD water. Defendants BLACKWELL, PARAMOUNT, PFE, POH, and PFI, entered into and joined in the aforesaid plan, scheme, and conspiracy to destroy the business of plaintiffs at the times and in the manner hereinabove set forth.

58. In formulating and effectuating the aforesaid conspiracy, plaintiffs have thus far learned that defendants conspired to perform, and did perform, and in furtherance of their unlawful scheme, plan, and conspiracy to eliminate plaintiffs as competitors, the unlawful acts set forth as follows:

A. The defendants, through their appointment of a majority of the Board of Directors and control of those Directors, continued to impose stand-by charges on plaintiffs, knowing that plaintiffs were unable to use BMWD water profitably;

B. The defendants, through their appointment of a majority of the Board of Directors and control of those Directors, foreclosed on BMWD landowners, and obtained use of the waters previously allocated to those landowners to which they would otherwise not have been entitled and at a much reduced rate;

C. The defendants interfered, interrupted, opposed, and blocked sales of BMWD water which would

have paid all of plaintiffs' delinquent assessments and yielded profits to plaintiffs and all other landowners in BMWD. These actions were done with the intent of insuring the maximum water entitlement to BMWD so that even in drought years the defendants would have adequate water supplies.

D. Defendants, through their appointment of a majority of the Board of Directors and control of those Directors, have indirectly threatened to foreclose upon plaintiffs for delinquent assessments, knowing that they would thereafter obtain plaintiffs' water allotments for themselves.

59. The foregoing acts were intentionally and maliciously done for the express purpose of destroying the business of plaintiffs and eliminating plaintiffs as competitors.

60. Said acts of defendants constitute unreasonable restraints upon interstate trade and commerce, and have crippled the business of plaintiffs by forcing them to incur unfair stand-by charges for water they could not use profitably, by preventing them from selling their water allotments, thereby preventing plaintiffs from paying their delinquent assessments and realizing a profit on their farm lands; and in these and various other respects have caused plaintiffs serious damage and loss as set forth below:

A. All plaintiffs were damaged by the unfair assessment of stand-by charges on land which they could not farm profitably, and therefore, did not order or receive water, and these damages will equal the amount of stand-by charges plus interest from the year in which

these charges were assessed until the present. By way of example, plaintiff, RODEN FARMS for the years 1982 through 1986 was assessed $426,432 in stand-by charges. At 7% interest, the interest accrued for those charges from the date they were incurred to the present equals $251,514 for total damages of $677,946. Plaintiff CAL FARM INVESTMENTS, INC., for the years 1983 through 1987, had total damages by this calculation of stand-by charges plus 7% interest from the date the charges were incurred to the present, of $1,702,200;

B. All plaintiffs were damaged by the prevention of water sales in the following manner:

Plaintiffs were allotted 2.82 acre feet per acre, and the proposed sales were for a price of $1,000 per acre foot, so that plaintiffs' total damages equals 2.82 times $1,000 times the number of plaintiffs' acres in BMWD minus the BMWD bonded indebtedness on these acres.

61. Unless the defendants are prevented from continuing to carry out the acts, plans, schemes, and conspiracy referred to above, plaintiffs' businesses will be destroyed or will continue to at least be seriously and irreparably injured and damaged.

62. The aforesaid acts of defendants have caused, and are continuing to cause, immediate and irreparable harm and damage to plaintiffs, for which there is no adequate remedy at law.

XI

SECOND CLAIM FOR RELIEF

ATTEMPT TO MONOPOLIZE – RULE OF REASON ILLEGALITY SHERMAN ACT SECTIONS 1 and 2

63. Plaintiffs incorporate herein by reference all of the above as though fully set forth therein.

64. Defendants PARAMOUNT, PFE, POH, PFI and BLACKWELL engaged in an unlawful conspiracy to monopolize trade, and attempted to monopolize farming and water entitlement within the BMWD, in violation of Section 2 of 15 U.S.C., commonly known as the Sherman Antitrust Act.

65. The aforesaid conspiracy or combination to monopolize and/or attempt to monopolize consisted of a continuing agreement, understanding, and concert of action among the defendants to embark upon a plan and scheme, individually and in conspiracy with others, to compete unfairly with plaintiffs, to assess stand-by charges and charges upon plaintiffs and other land-owners in BMWD who were unable to use water because of the prohibitive costs, to foreclose upon lands where these assessments were delinquent, to obstruct, interrupt, and prevent sales of water which would have paid all delinquent assessments and brought profit to plaintiffs and other landowners of BMWD, and to destroy plaintiffs as competitors.

66. In formulating and effectuating the aforesaid attempt to monopolize and conspiracy to monopolize, plaintiffs have thus far learned that defendants conspired to perform, and did perform, in furtherance of their

unlawful scheme, plan, and conspiracy to eliminate plaintiffs as competitors, the unlawful acts set forth as follows:

A. Defendants prevented two attempted sales of BMWD water, which would have paid all delinquencies and assessments owed by plaintiffs and allowed plaintiffs to realize a profit from the sale of their water entitlement;

B. Defendants, through their appointment of a majority of the Board of Directors and control of these Directors, caused BMWD to foreclose on BMWD landowners, and obtained use of the waters previously allocated to those landowners to which they would otherwise not have been entitled and at a much reduced rate;

C. Defendants, through their appointment of a majority of the Board of Directors and control of these Directors, then caused BMWD to threaten to foreclose upon plaintiffs for these delinquent assessments so that plaintiffs would lose their farming land within the BMWD, which would result in all of plaintiffs' water entitlement being available to defendants for their own use and profit, and which would have eliminated plaintiffs as competitors for water in the BMWD.

D. The foregoing acts were intentionally and maliciously done for the express purpose of destroying the business of plaintiffs and eliminating plaintiffs as a competitor, and have caused damages to plaintiffs as follows:

(1) All plaintiffs were damaged by the unfair assessment of stand-by charges on land which they could not farm profitably, and therefore, did not receive water,

and these damages will equal the amount of stand-by charges plus interests from the year in which these charges were assessed until the present. By way of example, plaintiff, RODEN FARMS for the years 1982 through 1986 was assessed $426,432 in stand-by charges. At 7% interest, the interest accrued for those charges from the date they were incurred to the present equals $251,514 for total damages of $677,946. Plaintiff CAL FARM INVESTMENTS, INC., for the years 1983 through 1987, had total damages by this calculation of unfair stand-by charges plus 7% interest from the date the charges were incurred to the present, of $1,702,200;

(2) All plaintiffs were damaged by the prevention of water sales in the following manner:

Plaintiffs were allotted 2.82 acre feet per acre, and the proposed sales were for a price for $1,000 per acre foot, so that plaintiffs' total damages equals 2.82 times $1,000 times the number of plaintiffs' acres in BMWD minus the BMWD bonded indebtedness on these acres.

67. Said acts of defendants would destroy plaintiffs as competitors in the BMWD and because defendants control the vote of the Board of Directors of BMWD, there is a dangerous probability that defendants will be successful in their plan.

68. Unless the defendants are prevented from continuing to carry out the acts, plans, schemes, and conspiracy referred to above, plaintiffs' businesses will be destroyed, or will continue to at least be seriously and irreparably damaged and injured.

69. The aforesaid acts of defendants have caused, and are continuing to cause immediate and irreparable harm and damage to plaintiffs, for which there is no adequate remedy at law.

XII

THIRD CLAIM FOR RELIEF

MONOPOLIZATION – RULE OF REASON ILLEGALITY UNDER SHERMAN ACT §§ 1 and 2

70. Plaintiffs incorporate herein by reference all of the above as though fully set forth herein.

71. Defendants PARAMOUNT, PFE, and POH began to acquire farm land within the BMWD in 1988 and 1989, and by September 1989, these defendants had acquired all of the land of West Hills Cooperative, West Falls Ranches, Secrist Ranch, and all of the pistachio acreage of BLACKWELL and El Vic Farm Corporation. These defendants thus became the largest landowner within the BMWD, owning, along with defendant BLACKWELL, approximately 55 percent of the land in the service area of BMWD, and also became the largest water user in the BMWD, using approximately 80 percent of the water available through BMWD.

72. Pursuant to their decision to monopolize the market for water deliveries within the BMWD, defendants elected two of their representatives to the five member BMWD Board of Directors. In March 1990, the Directors passed a motion to suspend proposed sales of BMWD surplus water. In September 1990, these defendants threatened to litigate against BMWD if the directors

voted to approve a contract to sell water to Summit Valley Water District, even though the Board of Directors had approved a Memorandum of Understanding approving sale of at least 20,000 acre feet to Summit Valley Water District. Also, in September 1990, defendants sent a strong opposition letter to KCWA, arguing that there was no surplus water in BMWD and threatening to nullify any transaction through any available avenue. Thereafter, defendants agreed to delay consummation of the Summit Valley deal until August 20, 1991, when defendants' representatives on the BMWD Board of Directors voted to cancel the Summit Valley Memorandum of Understanding, which motion was carried by a three to one vote. Thereafter, in June 1992, defendants, through their representatives on the BMWD Board of Directors, moved to send a letter to delinquent landowners, and did send a letter to plaintiffs indirectly threatening to foreclose on BMWD lands in assessment arrears.

73. The foregoing and other predatory practices, together with their dominant market position within BMWD, enabled defendants to maintain their monopoly power within the BMWD that threatens to destroy much of the remaining competition for BMWD water within the district.

74. Defendants' attempt to monopolize the market for BMWD water services and their actual monopolization of approximately 80 percent of water deliveries empowers them to foreclose competition in that market. Defendants' attempts to cause foreclosure on remaining landowners in BMWD who are in arrears in their assessments is designed to make it virtually impossible for

plaintiffs or other potential competitors to effectively farm within the BMWD.

75. Plaintiffs have been and continue to be injured, directly and proximately in their business and property by reason of defendants possession and continuing exercise of its monopoly power to foreclose competition. Such monopoly has prevented plaintiffs from realizing the benefits of water transfers, which would have eliminated plaintiffs' arrears and brought a profit to plaintiffs' farming operations. Defendants' power to foreclose competition threatens to drive plaintiffs out of business completely by forfeiting their lands within BMWD.

76. The foregoing acts are intentionally and maliciously done for the express purpose of destroying the business of plaintiffs and eliminating plaintiffs as a competitor and maintaining defendants' monopoly power within the BMWD, and have caused damages to plaintiffs as follows:

A. All plaintiffs were damaged by the unfair assessment of stand-by charges for land at which they could not farm profitably, and therefore, did not receive water, and these damages will equal the amount of stand-by charges plus interest from the year in which these charges were assessed until the present.

B. All plaintiffs were damaged by the prevention of water sales in the following manner:

Plaintiffs were allotted 2.02 acre feet per acre, and the proposed sales were for a price of $1,000 per acre foot, so that plaintiffs' total damages equals 2.82 times $1000

times the number of plaintiffs' acres in BMWD minus the BMWD bonded indebtedness on these acres.

77. Said acts of defendants would destroy plaintiffs as competitors in the BMWD and cause plaintiffs to lose their business and property in the BMWD.

78. Unless the defendants are prevented from continuing to exercise this monopoly power, plaintiffs' businesses will be destroyed, or will continue to at least be seriously and irreparably damaged and injured.

79. The aforesaid acts of defendants have caused, and are continuing to cause, immediate and irreparable harm and damage to Plaintiffs, for which there is no adequate remedy of law.

XIII

FOURTH CLAIM FOR RELIEF

INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

80. Plaintiffs incorporate hereby by reference all of the above as though fully set forth herein.

81. In or about 1991, plaintiffs had an economic relationship with third parties, with the probability of future economic benefit to plaintiffs, in that plaintiffs desired to sell their water allotment through BMWD, and BMWD had agreed to transfer water at the price of $1,000 per acre foot. Defendants, and each of them, knew of the above-described agreements to sell BMWD water in 1988 to Moulton Niguel Water District and in 1991 to Summit Valley Water District.

82. As hereinabove described, defendants intentionally acted to disrupt said economic relationship in that defendants caused Directors of the BMWD not to complete the agreed upon transfers of water, acted through their own representatives on the Board to cancel Memorandums of Understanding to transfer water and otherwise obstructed, hindered, and prevented the above described transfers of BMWD water by causing BMWD directors to abandon the agreed upon sale of water.

83. As a result of defendants' actions, said economic relationships were actually disrupted in that BMWD cancelled the Memorandums of Understanding for the proposed water transfers and broke off contract negotiations with prospective water purchasers.

84. As a proximate result of defendants' conduct and the severance of contract negotiations by BMWD, plaintiffs have suffered damages in an amount to be determined at trial.

85. The aforementioned acts of defendants, and each of them, were willful and oppressive and malicious. Plaintiffs are therefore entitled to punitive damages in an amount to be determined at trial

XIV

FIFTH CLAIM FOR RELIEF

NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

86. Plaintiffs incorporate herein by reference all of the above as though fully set forth herein save and except Paragraph 82.

87. Defendants were aware, when they interfered with the proposed water transfers, that plaintiffs were depending upon the proceeds of said water transfers to pay off debts and maintain their farming and property interests in the BMWD, and that plaintiffs would be injured by the loss of these water sale proceeds. Defendants had a duty to refrain from taking actions under color of their official capacity which would interfere with and damage plaintiffs as aforesaid. Nevertheless, defendants caused Directors of the BMWD not to complete the agreed upon transfers of water, acted through their own representatives on the Board to cancel Memorandums of Understanding to transfer water and otherwise obstructed, hindered, and prevented the above described transfers of BMWD water by causing BMWD Directors to abandon the agreed upon sale of water. In so doing, defendants negligently interfered in the proposed sales and prevented the BMWD from completing these transfers of water.

88. As a result of defendants' negligence, the BMWD transfers were negated and plaintiffs suffered damages in an amount to be determined at trial.

XV

SIXTH CLAIM FOR RELIEF

CALIFORNIA CARTWRIGHT ACT AND UNFAIR COMPETITION LAWS - CAL. BUS. & PROF. CODE §§ 16700-16760, 170000-17101, 17200-17208

89. Plaintiffs incorporate herein by reference all of the above, as though fully set forth.

90. Since 1988 and up to the present time, defendants, and each of them, combined, conspired, and decreed together and continue to combine, conspire, and agree to create restrictions in trade and to prevent competition in the purchase of SWP water within BMWD.

91. In furtherance of this unlawful combination, conspiracy, and agreement, defendants obstructed, hindered, interfered, and prevented the transfer of BMWD water in 1988 and 1991, and indirectly threatened to reinstate foreclosure proceedings upon land owners within BMWD who were delinquent in payment of their assessments.

92. As a direct consequence of the acts of defendants, and each of them, competition in farming and in purchasing and obtaining SWP water through BMWD has been restrained, suppressed, and eliminated.

93. As a direct consequence of the agreement, acts, and course of conduct of defendants, and each of them, plaintiffs were deprived of the opportunity to realize a profit from the sale of water to other water districts. As a result of defendants actions, plaintiffs have been damaged as follows:

A. All plaintiffs were damaged by the unfair assessment of stand-by charges on land which they could not farm profitably, and therefore, did not order or receive water, and these damages will equal the amount of stand-by charges plus interest from the year in which these charges were assessed until the present.

B. All plaintiffs were damaged by the prevention of water sales in the following manner:

Plaintiffs were allotted 2.82 acre feet per acre, and the proposed sales were for a price of $1,000 per acre foot, so that plaintiffs' total damage equals 2.82 times $1,000 times the number of plaintiffs' acres in BMWD, minus the BMWD bonded indebtedness on these acres.

Under § 16750(a) of the California Business and Professions Code, Plaintiffs are entitled to interest on the aforementioned sum from the date of service of this complaint until entry of judgment thereon, to their reasonable attorney's fees, and to treble damages.

94. Defendants' continued wrongful conduct as alleged above, unless and until restrained by order of this court, will cause great and irreparable harm to plaintiffs.

XVI

SEVENTH CLAIM FOR RELIEF

DECLARATORY RELIEF

95. Plaintiffs incorporate herein by reference all of the above, as though fully set forth.

96. Defendant BERRENDA MESA WATER DISTRICT has, and at all times mentioned herein had, a fiduciary duty to all members of the Berrenda Mesa Water District, including the minority landowners within the district.

97. An actual controversy has arisen and now exists between plaintiffs and defendants concerning their respective rights and duties, in that plaintiffs contend that the Berrenda Mesa Water District, acting through its agents, has breached and continues to breach its fiduciary duties to minority landowners in the district by failing to

complete agreed upon transfers of water, and by not aggressively pursuing, on behalf of those members interested in selling water, sales of water. Defendant BERRENDA MESA WATER DISTRICT disputes these contentions and contends that it has not breached its fiduciary duties to minority landowners within the district.

98. Plaintiffs desire a judicial determination of their rights and defendant's duties.

99. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiffs may ascertain their rights with respect to any future sales of water particularly because Berrenda Mesa Water District purports to be currently considering sales of water.

WHEREFORE, plaintiffs pray that judgment be entered against defendants as follows:

XVII

FOR RELIEF UNDER THE FIRST CLAIM

1. That the court adjudge and decree that defendants have entered into a contract for conspiracy and in unreasonable restraint of trade and commerce in violation of § 1 of the Sherman Act, that the foresaid contract or conspiracy is illegal, and that said contract or conspiracy be ordered to be cancelled and terminated;

2. Defendants, and each of them, be enjoined preliminarily during the pendency of this action, and permanently thereafter from:

(a) Foreclosing upon plaintiffs' property for the payment of delinquent stand-by charges and water toll assessments.

(b) Directly or indirectly hindering or obstructing, or preventing the sale of BMWD water to persons or entities outside BMWD.

(c) Directly or indirectly assessing stand-by charges to plaintiffs, when plaintiffs are unable to economically utilize their entitlement to BMWD.

(d) Unfairly competing with plaintiffs, and

(e) Conspiring with one another to do the foregoing acts;

3. That the plaintiffs have such other, further, and different relief, which to the court may seem necessary and appropriate;

4. For damages against defendants, and each of them, for threefold the amount of damages proved at trial together with plaintiffs' reasonable attorney's fees and all costs and disbursements of this action.

XVIII

FOR RELIEF UNDER THE SECOND CLAIM

1. That the court adjudge and decree that defendants have attempted and/or conspired to monopolize in unreasonable restraint of trade in violation of Section 2 of the Sherman Act, that the aforesaid attempt or conspiracy is illegal, and that said attempt or conspiracy be ordered to be cancelled and terminated.

2. That the court issue an injunction restraining perpetually the defendants, their successors, assignees, officers, directors, agents, employees, and persons acting for or in their behalf, from continuing the unlawful affects of such conspiracy.

3. That the plaintiffs have such other, further, and different relief which to the Court may seem necessary and proper.

4. That the court grant judgment for plaintiffs against defendants for threefold the amount of damages proved at trial together with reasonable attorney's fees and all costs and disbursements of this action.

XIX

FOR RELIEF UNDER THE THIRD CLAIM

1. That the Court adjudge and decree that defendants BLACKWELL, PARAMOUNT, PFE, and POH have acquired and maintained a monopoly of SWD water available through the BMWD, and has acquired and maintained that power in violation of Section 2 of the Sherman Antitrust Act;

2. That the Court issue an injunction restraining perpetually the defendants, their successor, assignees, officers, directors, agents, employees, and persons acting for or in their behalf, from undertaking further acquisition or acts to maintain that power and monopoly of SWP water and BMWD;

3. That the court order that defendants be required to divest themselves of all or such portion of their water entitlement as is deemed necessary to restore normal

competitive conditions, as soon after the final decision in this court is entered, as this court deems reasonable;

4. That plaintiffs have such other, further, and different relief which to the court may seem necessary and appropriate;

5. That the Court grant a judgment for plaintiffs against defendants for threefold the amount of damages as proved at trial together with reasonable attorney's fees and all costs and disbursements of this action.

XX

FOR RELIEF UNDER THE FOURTH CLAIM

1. That the Court grant judgment for plaintiffs against defendants for damages in an amount to be determined at trial;

2. For exemplary and punitive damages in an amount to be determined at trial;

3. For plaintiffs' costs incurred;

4. That the plaintiffs have such other, further, and different relief which to the Court may seem necessary and proper.

XXI

FOR RELIEF UNDER THE FIFTH CLAIM

1. That the Court grant judgment for plaintiffs against defendants for damages in an amount to be determined at trial;

2. For plaintiffs' costs incurred;

3. That the plaintiffs have such other, further, and different relief which to the court may seem necessary and proper.

XXII

FOR RELIEF UNDER THE SIXTH CLAIM

1. That the Court adjudge and decree that defendants have attempted and/or conspired to carry out restrictions in trade or commerce and to prevent competition in the sale of water and unreasonable restraint of trade in violation of § 16720 of the California Business and Professions Code, that the aforesaid conspiracy is illegal, and that said attempt or conspiracy be ordered to be cancelled and terminated;

2. That the Court issue an injunction restraining perpetually the defendants, their successors, assignees, officers, directors, agents, employees, and persons acting for or in their behalf from continuing the unlawful effects of such conspiracy;

3. That the plaintiffs have such other, further, and different relief which to the court may seem necessary and proper;

4. That the Court grant judgment for plaintiffs against defendants for threefold the amount of damages proved at trial together with reasonable attorney's fees and all costs and disbursements of this action;

5. For interest from and after the date of service of this complaint at the legal rate.

XXIII

FOR RELIEF UNDER THE SEVENTH CLAIM

1. That the Court declare the rights and duties of the parties as follows: that defendant BERRENDA MESA WATER DISTRICT has breached its fiduciary duty to minority landowners within the district by failing to complete agreed upon transfers of water, by cancelling Memoranda of Understanding to transfer water, and by not aggressively pursuing sales of water on behalf of those members interested in selling water;

2. That the plaintiffs have such other, further, and different relief which to the Court may seem necessary and proper.

Dated: December 23, 1992.

JOSEPH W. COTCHETT (SBN 36324)
SUSAN ILLSTON (SBN 57378)
JOHN L. FITZGERALD
(SBN 126613)
NIALL McCARTHY (SBN 160175)
COTCHETT, ILLSTON & PITRE

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THOMAS BECK (SBN 123261)
DAMRELL, NELSON, SCHRIMP,
PALLIOS & LADINE

TIMOTHY BUCHANAN
(SBN 100400)
G. SCOTT FITZGIBBON
(SBN 141530)
DIETRICH, GLASRUD & JONES

By /s/ Matthew O. Pacher
MATTHEW O. PACHER
for Plaintiffs

PLAINTIFFS DEMAND TRIAL BY JURY

Plaintiffs hereby demand trial by jury on all counts in this complaint.

Dated: December 23, 1992.

By /s/ Matthew O. Pacher
MATTHEW O. PACHER
for Plaintiffs

(5)

FILED

AUG 2 1995

CLERK

No. 95-23

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

WILLIAM RODEN, as Trustee of Ernest M. Still Trust; RODEN FARMS, a General Partnership; CAL FARM INVEST, INC., a California corporation; GARY HAMILTON, an individual; SUSAN HAMILTON, an individual,
Petitioners,

vs.

BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO., L.P., a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court exercise its discretionary jurisdiction to determine whether the Ninth Circuit erred in holding that federal antitrust liability may not be premised upon either (1) a California Water District's taking actions expressly authorized by California law, or (2) private parties' allegedly conspiring to influence those actions?

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No. 95-23

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

WILLIAM RODEN, as Trustee of Ernest M. Still Trust; RODEN FARMS, a General Partnership; CAL FARM INVEST, INC., a California corporation; GARY HAMILTON, an individual; SUSAN HAMILTON, an individual,
Petitioners,
vs.
BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO., L.P., a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

The Paramount respondents[1] respectfully pray that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

[1] In the courts below, Petitioners named Paramount Farming Co., L.P., Paramount Orchards Holdings, Inc., Paramount Farming Enterprises, Inc., and Paramount Farms, Inc. (collectively, "Paramount"). However, Petitioners appear to be pursuing their case in this Court

SUMMARY

Petitioners wholly fail to show that this case presents any "special and important reasons" that would justify the Court's granting their petition for a writ of certiorari. Sup. Ct. R. 10. To the contrary, this case presents a textbook example of conduct that is protected from federal antitrust liability under the well-developed *Noerr-Pennington* and state action immunity doctrines. Both the District Court and the Ninth Circuit so held. Petitioners do not claim that these decisions — unpublished in any event — conflict with decisions in other Circuits. Nor do Petitioners claim that this case concerns an undecided legal issue of broad or exceptional significance. Instead, petitioners simply argue that the Ninth Circuit erred in applying the clear law to the particular facts at issue. Even were this argument correct (and we demonstrate below that it is not), it would not warrant the Court's granting the writ.

STATEMENT

Petitioners own land within the Berrenda Mesa Water District ("BMWD") in Kern County, California. They are unhappy with various BMWD decisions, expressly authorized by California law — imposing standby charges and *ad valorem* taxes, foreclosing or threatening to foreclose on lands where assessments are delinquent, and rejecting proposed sales of district water. Rather than challenge these official decisions in state administrative or judicial proceedings, petitioners brought this federal antitrust case. They named as defendants the BMWD, Paramount, and Blackwell Land Company, Inc.

Under the legislatively-mandated scheme for electing the BMWD's board, landowners vote in proportion to the as-

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against only Paramount Farming Co., L.P. and Paramount Orchards Holdings, Inc.

sessed value of their land within the District. Cal. Water Code § 35003. Board members must be either landowners, in the case of individuals, or representatives of landowners, in the case of corporations. *Id.*, § 34700. In *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), this Court found that these election procedures are constitutional.

In their complaint,[2] Petitioners allege that Paramount and Blackwell are the two largest landowners in the BMWD, and that two of the five BMWD board members are Paramount representatives while two others are Blackwell representatives. Petitioners allege antitrust liability with respect to Paramount and Blackwell on the ground that these defendants purportedly held "closed meetings" and entered into "secret agreements" to influence certain BMWD decisions for their own selfish interests. Petitioners also allege that these defendants, through their voting power, controlled BMWD board elections and, therefore, certain actions of the BMWD that affected Petitioners.

Based upon an unambiguous line of decisions by this Court and the Courts of Appeals, both the District Court and the Ninth Circuit issued unpublished dispositions holding that the defendants' alleged conduct was immune from antitrust liability. As the Ninth Circuit concluded,

> Plaintiffs' allegations do make out a case that the defendant landowners [Paramount and Blackwell] acted in their own self interest in bringing about water district decisions favorable to them and detrimental to the plaintiffs. However, it is beyond the scope of the antitrust laws "to identify and invalidate lobbying that

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[2]Petitioners' complaint is reproduced as Exhibit A to the BMWD's Brief in Opposition.

has produced selfishly motivated agreement with public officials."

P.C.B. 7 (*quoting City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 383 (1991)).

ARGUMENT

I.

No Important Or Special Reasons Justify The Court's Exercising Its Discretionary Jurisdiction To Review This Case.

The courts below issued unpublished dispositions analyzing the facts of this case under the *Noerr-Pennington* and state action antitrust immunity doctrines. It is undisputed that there are no pertinent ambiguities or gaps in this Court's opinions on these subjects. It is undisputed that there is no Circuit conflict. Petitioners' sole contention is that the Ninth Circuit erred in applying these doctrines to the specific facts alleged in their complaint. Even were Petitioners correct, this would not justify the Court's exercising its discretionary jurisdiction to review this case. The writ should be denied on this ground alone.

II.

The Ninth Circuit Correctly Determined That The *Noerr-Pennington* Doctrine Immunizes Paramount From Liability For Its Alleged Attempts To Influence The BMWD's Actions.

The Ninth Circuit correctly determined that Paramount is immune from scrutiny for its alleged attempts to influence the BMWD's actions. Under well-established precedents, private parties are shielded from antitrust liability for efforts to influence government action, regardless of whether those efforts are allegedly intended to eliminate or restrain compe-

tition and regardless of whether those efforts are alleged to involve collusion between the private parties and governmental actors. *E.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-84 (1991).

Petitioners now argue the so-called "sham" exception to *Noerr-Pennington* immunity. "The 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *City of Columbia*, 499 U.S. at 380 (*citing California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)).

Petitioners did not allege the sham exception in their complaint, and did not argue it below. They may not raise it for the first time here. *E.g., Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992).

Moreover, despite Petitioners' omission, the District Court did address the issue in its comprehensive opinion, correctly holding that the sham exception is inapplicable. As the District Court noted, Petitioners themselves alleged that Paramount's and Blackwell's attempts to influence the BMWD — far from being a sham — were actually successful:

> Blackwell and Paramount's *Noerr-Pennington* immunity does not fail under the sham exception because the defendants' alleged activities were actually directed at the governmental entity, to achieve a desired result from the governmental entity. Blackwell and Para-

> mount claim they sought to prevent the sale of District water to assure the District an adequate water supply through future droughts. The Board's refusal to approve water sales suggests that Blackwell and Paramount's efforts were successful. *City of Columbia* extends Blackwell and Paramount *Noerr-Pennington* immunity even if their ultimate goal is to weaken plaintiffs' business, so long as they sought to achieve this goal through governmental action.

P.C.A. 31-32. Petitioners cannot evade the limitations of the sham exception simply by characterizing Paramount and Blackwell as having "sought to bar their competitors from meaningful access to District decisions." Pet. Cert. 13-14. As this Court has held, such alleged conduct is similarly immune from antitrust scrutiny:

> As for denying meaningful access to the appropriate city administrative and legislative fora, that may render the manner of lobbying improper or even unlawful, but does not necessarily render it a sham. . . . Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored.

City of Columbia, 499 U.S. at 381-382 (citations and internal quotation marks omitted). Likewise, Petitioners' repeated use of the term "government process," Pet. Cert. 7, 13-14, cannot change the fact that Petitioners' underlying complaint is that the BMWD's decisions were wrong and resulted from BMWD board members' conspiring with Paramount and Blackwell to put their interests above Petitioners' interests. This purported harm — which, as the Ninth Circuit recognized, necessarily stems from actual "decisions of the water district not to sell water and to impose standby charges," P.C.B. 6, is fundamentally inconsistent with the sham exception. "If Noerr teaches anything it is that an intent to restrain trade as a *result* of the

government action sought does not foreclose protection." *City of Columbia*, 499 U.S. at 381 (citation and internal quotation marks omitted, emphasis in original).

III.

The State Action Immunity Doctrine Independently Bars Petitioners' Claims Against Paramount.

Because the only acts from which Petitioners' alleged injury arose were the official acts of the BMWD's board, and because there is no "conspiracy" exception to state action immunity, Petitioners' claims against Paramount are also barred in their entirety by that doctrine. This is an independent basis on which the Court should deny the writ.

State action immunity applies to claims arising from official actions regardless of whether an antitrust plaintiff names as the defendant (1) the governmental entity that took the actions, (2) the individuals who actually made the decisions at issue in their official capacity, or (3) these individuals in their private capacity. *Fisichelli v. City Known as Town of Methuen*, 956 F.2d 12, 15-16 (1st Cir. 1992). In *Fisichelli*, the plaintiffs sued a number of members of a town council in their private capacities. The plaintiffs alleged that the council members had entered into a secret agreement to vote against financing bonds to build a mall, in order to prevent the construction of a drugstore that would compete with one owned by a council member. In an opinion authored by then-Chief Judge Breyer, the First Circuit held that state action immunity barred the plaintiffs' claims, stating:

> [A]ppellants point out that the plaintiffs in [*City of*] *Columbia* sued the city itself, while in the present action appellants have sued not only the bond Authority, but also the town manager and town councilors "in their private capacities." The basic conduct of which

> the plaintiffs complain, however, concerns a decision taken by the individual defendants in their roles as town (or municipal Authority) officials. We do not believe that a plaintiff can avoid the ruling of *Columbia* simply by substituting, for the name of the town, the names of the town officials who approved the challenged municipal action.

Id., at 15-16. Likewise here, Petitioners cannot evade state action immunity by suing Paramount, because Petitioners' alleged damages all flow from the official actions of the BMWD — imposing taxes and fees, foreclosing on land, and failing to approve water transfers. Rather, for the same reasons that state action immunity precludes Petitioners' claims against the BMWD, state action immunity also precludes Petitioners' claims against Paramount.[3]

The case in which this Court first enunciated the state action immunity doctrine, *Parker v. Brown*, 317 U.S. 341 (1943), itself involved an analogous situation in which a majority of private raisin producers were required to approve by referendum the California Agricultural Commission's restrictions on the marketing of raisins. *Id.* at 347. This Court dismissed out of hand the suggestion that state action immunity could be defeated where private parties — and self-interested private parties, at that — vote on or otherwise contribute to governmental action. The Court stated:

> Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it

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[3] Analogously, Paramount — like the BMWD — need not show active state supervision to qualify for state action immunity. Moreover and in any event, for the reasons stated in the BMWD's brief, active state supervision exists here.

> with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions.

Id., at 352. In other words, where the statutory scheme is such that actions taken by a state board must be approved by direct vote of private persons, the private persons are not subject to antitrust liability in connection with their votes. The case for state action immunity is even stronger in the current case in which the BMWD's actions need be approved only by the vote of elected representatives acting in their official capacity as BMWD board members.

Moreover, *it is state law*, and not the private agreement of Paramount and Blackwell, which mandates that representation on the BMWD's board and, consequently, control over its actions, be determined by landowner-voters in proportion to their holdings. As noted, this Court has expressly found that procedure to be constitutional. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). If antitrust immunity could be defeated wherever one disagreed with a BMWD decision, BMWD board members would be left with the Hobson's choice of either voting against the position of the majority of their constituents or facing potential criminal and treble damages liability by the minority. This is precisely the evil that the state action immunity doctrine is meant to avoid.

Nor does Petitioners' allegation of "closed meetings" and "secret agreements" defeat state action immunity. This Court expressly rejected a "conspiracy" exception to both

state action and *Noerr-Pennington* immunity in *City of Columbia*. 499 U.S. at 374 ("There is no such conspiracy exception."), 383 ("a 'conspiracy' exception to Noerr must be rejected"). The Court explained that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them," *id.*, at 375, and noted that "[t]he California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a 'conspiracy' to put the 'private' interest of the State's raisin growers above the 'public' interest of the State's consumers," *id.*, at 377.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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